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Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*

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I. INTRODUCTION: THE STATE'S ATTITUDES TOWARD ALTERNATIVES TO ADJUDICATION

At the end of each year, newspapers do "round ups" of events, attempting to summarize and to take stock of what has transpired over the preceding twelve months. As the end of a century approaches, the impulse for assessment grows greater. We have the luxury, the obligation, or the conceit of contemplating a goodly period of time, to ask the questions inscribed on the famous Gauguin painting: "Where do we come from? What are we? Where are we going?"¹

In this lecture, I place those questions in the context of alternative dispute resolution ("ADR") and adjudication, in the hopes of gaining insights into the future of adjudicatory procedures as we approach the end of the twentieth century. Below, I map both the changing attitudes toward ADR and the claims made on behalf of ADR, as well as changing attitudes toward adjudication and its attributes.

As the title for this lecture forecasts, my review prompts me to be less optimistic than others about the array of options that are and will be available to litigants seeking decision making from the state. The assumption of many proponents, that ADR will increase the options available to litigants within the publicly financed system, may not be borne out. As the state makes alternative dispute resolution its own, both ADR and adjudication are being reconceptualized. As we proceed into the next century, the commitment to twentieth century style adjudication is waning. In this interaction, we may soon find ourselves with a narrower, not a richer, range of forms of dispute resolution.

As is familiar, neither adjudication nor alternative dispute resolution are inventions of this century, nor are they static concepts. Further, as Professor Ian MacNeil has recently explained, state-based adjudication is the "Johnny-come-lately" to the dispute resolution process.² MacNeil has provided a history of the law of arbitration in the United States; his work is helpful to my enterprise.³ He takes as his task to correct the understanding

¹ Paul Gauguin, "D'ou venons-nous? Que sommes-nous? Ou allons-nous?," 1897, Museum of Fine Arts, Boston, Tompkins Collection. See MICHAEL GIBSON, PAUL GAUGUIN (Rizzoli, 1993).

² IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 4 (1992).

³ His recently published history of twentieth century attitudes toward arbitration also provides a helpful cautionary caveat to my comments here. All scholars of dispute resolution must take care when making claims about nineteenth century attitudes toward courts and other forms of dispute resolution. Given limited records and research of that period, definitive statements about the relative value attributed to adjudication and to other forms of dispute

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of the law in the United States about "private" agreements between parties to arbitrate disputes.⁴ The description commonly offered is that "the law" has long taken a dim view of the enforcement of such contracts and of arbitration in general. MacNeil brings a different perspective to what he terms this historical picture of "unrelieved judicial or legislative hostility to arbitration."⁵

MacNeil argues that the standard story is wrong; that during the nineteenth century, state legislatures and the common law looked favorably on agreements to arbitrate.⁶ He uses, as illustration, legislation such as an Illinois statute of 1873, which permitted parties to refer pending cases to arbitration and to have the help of the court in setting up the arbitration process.⁷ With MacNeil's work and other research, contemporary critics of courts can invoke comments from nineteenth century lawyers and judges who, like today's lawyers and judges, complained about adjudication as slow and costly and argued for arbitration (as well as "mediation and conciliation"⁸) as alternative means of resolving disputes.

MacNeil's questions (What came first? Alternative dispute resolution or dispute resolution by the state? What was the state's attitude toward private agreements to arbitrate?) provide a point of departure for my discussion about late twentieth century attitudes and assumptions. Professor MacNeil posits the existence of two systems during both the nineteenth and the twentieth centuries: on the one hand, adjudication as the dispute resolution system of the state, and on the other hand, "private" dispute resolution systems. MacNeil then traces the changing tone of the state's attitudes toward the relationship of the two systems—first encouragement (in the nineteenth century) with some reservations; then hostility and unenforceability of agreements to arbitrate (in the first half of the twentieth century); and most recently, an embrace of such agreements and the federalization of arbitration law in the United States.

resolution are difficult to substantiate.

⁴ MacNeil describes one of his purposes as correcting the historical record and demonstrating that judicial "hostility" to the enforcement of arbitration is not as longstanding as some have claimed. MACNEIL, *supra* note 2, at 17-21.

⁵ *Id.* at 19.

⁶ *Id.* at 17-24.

⁷ *Id.* at 17-18, 183 & n.10 (citing ILL. REV. STAT. ch. 10, ¶¶ 1-18 (Hurd, 1915-16), and referring to an earlier, similar act dating from 1845).

⁸ See Edgar J. Lauer, *Conciliation and Arbitration in the Municipal Court of the City of New York*, 1 AM. JUDICATURE SOC'Y 153 (1918) (criticizing trial as a "battle," and urging a "new method of disposing of the great mass of disputes and contentions that ordinarily are brought to court" by rules of the Board of Justices of the Municipal Court of the City of New York and providing for conciliation and arbitration).

My description of more recent history (primarily the last four decades) provides another framing. MacNeil's major assumption—two distinct systems in conversation with each other, with ADR existing apart from the state⁹—is decreasingly reflective of contemporary trends. During the last few decades, ADR has become an *integral* part of the state's mechanisms for responding to disputes.¹⁰ From one perspective, the two systems are no longer discrete conversants but have begun to be "integrated," "melded," or "collapsed" into each other. From another vantage point, the state's system is increasingly in disarray, and the "private" system is becoming the one of choice, when litigants have the resources and ability to "opt out."¹¹

Of course, which description to offer—"integration," "melding," "collapse," or something else—depends on one's views about the desirability of the co-mingling, conflation, and alteration of the two modes of decision making. I will return to this point after I establish my prior claim: the merging modes of dispute resolution.¹² To trace this blurring of

⁹ Occasional examples exist of state incorporation of different forms of dispute resolution. See, e.g., *id.* at 153-54 (arbitration under the 1915 rules of New York City's Municipal Court included the option of using the judge as an arbitrator as a means of dispelling the objection that arbitrators were neither experienced in settling disputes nor sufficiently independent from the parties). However, the extent of contemporary efforts at such integration marks the development (detailed below) of something different from those prior examples.

¹⁰ As the Honorable Ann Claire Williams, the representative of the Judicial Conference of the United States ("the policy making body of the federal judiciary"), explained in her testimony on proposed expansion of court-annexed arbitration in the federal courts, "Judicial use of Alternative Dispute Resolution (ADR) programs was firmly grounded in the Federal Courts" prior to 1990, when Congress enacted the Civil Justice Reform Act. See *The Court Arbitration Authorization Act of 1993: Hearings on H.R. 1102 Before Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 16 (May 5, 1993) [hereinafter *Hearings on H.R. 1102*]. See also discussion, *infra* Parts IVB-E.

¹¹ See Bryant G. Garth, *Privatization and the New Market for Disputes: A Framework for Analysis and a Preliminary Assessment*, 12B STUD. IN LAW, POL. & SOC'Y 367, 374 (Susan S. Silbey & Austin Sarat eds., 1992) ("Courts will compete for desirable business, and some of the reforms within public courts that have been described as privatization can be seen as part of the competition for an attractive dispute resolution process.") (emphasis in original); Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L. REV. 891, 892 (1993) ("The courts face a burgeoning industry in alternative dispute resolution . . . that threatens to siphon off many civil cases, including those of litigants wealthy enough to afford it.").

¹² In a future essay, I will address what will not be detailed here: the relationships among administrative adjudication, ADR, and court-based adjudication. I do want to note that one way to conceptualize the growth of administrative adjudication is to understand it as

forms, I will turn to conversations among judges, members of Congress, the Executive, and lawyers, all speaking about the reasons for adopting ADR programs.

Before doing so, I should note that my focus here is internal to the civil dispute resolution system, about what reforms were proposed as programmatic change and how they were contrasted with adjudication.¹³ I am here following Professor Stephen Yeazell's injunction to seek to understand the "relationship among the changes" within a procedural system.¹⁴ Of course, considerations of dispute resolution must also entail many forces that shape procedural reformation. Other variables (from market incentives, technology,¹⁵ the structure of the legal profession, the nature of manufacturing to international relations) are also important parts of the story of the changing forms of civil dispute resolution.¹⁶ Further, as I

ADR, a diversion of disputes from court-based adjudication to a forum perceived to be quicker, easier, and better suited for certain disputes. Further, the interaction between administrative adjudication and court-based adjudication has resulted in some melding of forms, as well as in some transposition of adjudication in certain kinds of individual cases, from federal courts to federal agencies, who rely for adjudication, on pretrial processes more limited than those available in federal courts.

¹³ Yet another topic is the relationship between civil and criminal caseloads. Commentators believe that increased criminal jurisdiction coupled with the flow of resources to and popular demand for prosecution have resulted in diminished resources for civil adjudication. Charles E. Lindner, *With the Courts Crowded, Private 'Justice' for the Rich and Famous*, L.A. TIMES, Dec. 25, 1994, at M6 (In December of 1994, "23 of the 40 civil-trial courts" in downtown Los Angeles were converted to use for criminal case.). In the federal system, criminal filings increased by 50 percent between 1981 and 1991 and criminal cases per judgeship rose by 10 percent. UNITED STATES DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, at 494, Table 5.23, 5.24. Research on the federal side shows that criminal dockets vary by jurisdiction, thus having a more complex interaction with the civil docket. See, e.g., Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. CAL. L. REV. 99, 131, 133 (1992) (criminal trial rates varied by kind of offense; criminal filings varied by districts).

¹⁴ Stephen C. Yeazell, *Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 632 (emphasis in original).

¹⁵ Computers and the ability to photocopy have had a critical impact on twentieth century procedural history; it is difficult to imagine what would have been the perception and use of discovery, had it emerged without the capacity to create and copy vast numbers of documents.

¹⁶ See Garth, *supra* note 11, at 368 ("[W]e cannot understand developments outside the courts without relating them to developments inside the courts; . . . national developments must be understood in relationship to transnational phenomena."). See also Harry N.

develop, the attitudes that inform contemporary revisions of dispute resolution are related to views on the role and limits of government.¹⁷

II. THE CALL FOR MANY DOORS

In this lecture, my interest is narrower than that vast world. So I turn back less than two decades, to 1976 and the Pound Conference,¹⁸ a meeting of some 250 judges, lawyers, court administrators, law professors, and non-lawyers at which Professor Frank Sander called for a "multi-doored" courthouse.¹⁹ Reviewing his published comments is useful, for what was written not yet twenty years ago seems like it was aimed at a group of people removed from us by many more than two decades.

Professor Sander took as his burden the need to explain the "significant characteristics of various alternative dispute resolution mechanisms."²⁰ He assumed his readership's familiarity with adjudication; his task was to educate his readers on what else there was and then to persuade his readers

Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts*, 66 S. CAL. L. REV. 2049, 2051-57 (1993) (considering both external and internal factors affecting California courts).

¹⁷ See, e.g., Rashi Fein, *The Politics of Health Reform*, DISSENT, Winter 1994, at 43 (Health care reform efforts in 1993-94 were defined by assumptions of a preference for private-sector action.).

¹⁸ Honorable Avern Cohn, *The Pound Conference*, 60 MICH. B.J. 35 (January 1981) (reviewing THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE (Leo Levin & Russell R. Wheeler, eds., 1979) [hereinafter THE POUND CONFERENCE]). See also *Opinion & Comment: Pound Revisited*, 62 A.B.A. J. 359 (1976). The 1976 Pound Conference invoked the 1906 Roscoe Pound speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, delivered Aug. 29, 1906 in St. Paul, Minnesota, to the ABA's annual meeting, and which served as another landmark in the history of procedural reform. See 29 A.B.A. Rep. 396 (1906), and THE POUND CONFERENCE.

¹⁹ In his essay, Professor Sander did not use that phrase; he termed his model not "simply a courthouse but a Dispute Resolution Center." Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976), which was a part of the materials from the *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976). Others have come to cite Sander as proposing the "multi-doored courthouse." See, e.g., *The Judicial Improvements Act of 1990: Report of the Comm. on the Judiciary*, S. REP. NO. 416, 101st Cong., 2d Sess. 28 n.15 (Aug. 3, 1990); Robert B. McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818, 824 (1988); Jethro K. Lieberman & James F. Henry, *Lessons From the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 427 n.17 (1986); Charles Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76, 93 (1984).

²⁰ Sander, *supra* note 19, at 113.

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of the desirability and utility of those "alternative dispute resolution forms." His purpose was to suggest "promising avenues to explore."²¹

Professor Sander's key move was to focus the discussion not on substantive areas (i.e., should tax cases go to a specialized court?) but rather on *process*. He urged that across a wide variety of disputes, the process should be elaborated, and a mediation, conciliation, or alternative phase be *incorporated* into it.²² Professor Sander pointed to some experiments with these processes, labeled "alternative dispute resolution," as evidence of the plausibility of his proposals.²³

Pause to consider the metaphor that has come to encapsulate his ideas: a "multi-doored courthouse."²⁴ The image has a good deal of appeal, stemming in part from its implicit reliance on the phrase "access to justice" to posit a structure with several doors of entry. In his reprinted speech, Frank Sander actually described a "lobby" in which a litigant could be "channelled through a screening clerk"²⁵ to one of six doors, comprising "a diverse panoply of dispute resolution processes."²⁶ Specifically, one might be sent to "mediation, arbitration, fact finding, malpractice screening panel, superior court," or an ombudsperson.²⁷

While "flexible,"²⁸ this model also assumed something presumably stable: the courthouse was a known, readily conjured-up entity. In fact, one of the doors in the Sander lobby was to something called the "superior court." Moreover, one of Professor Sander's goals was to "reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique abilities."²⁹ Whatever the number of doors, the call was for access to and preservation of the courthouse.

²¹ Sander, *supra* note 19, at 133.

²² *Id.* at 127. Professor Sander thus echoed the trans-substantive premises of the 1938 Federal Rules of Civil Procedure, which provide one set of procedures across a wide array of substantive disputes. See Robert M. Cover, *Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219 (1989).

²³ He suggested criteria, including the nature of the dispute, the relationship among the parties, the amount in dispute, the cost of disputing, and the speed of decision making, as relevant to determining what form of dispute resolution is appropriate. Sander, *supra* note 19, at 118-26.

²⁴ See *supra* note 19.

²⁵ *Id.* at 131.

²⁶ *Id.* at 130.

²⁷ *Id.* at 131.

²⁸ *Id.* at 131.

²⁹ Sander, *supra* note 19, at 132.

It is fair to say that, within a very short time period (less than two decades), Frank Sander's call has been heard. It is worth mapping that shift, from disinterest and some hostility toward ADR to the embrace of it as a mode of responding to disputes.

III. ADR AS A GENERIC FORM

Before detailing the shift, both in practice and in ideology, to show the markers in law and doctrine that delineate the state's endorsement of ADR, a definitional framework for alternative dispute resolution is needed. Thus far, my shorthand phrase "ADR" has assumed a uniformity of activity unfair to the complexity and richness of the ADR arena.³⁰ I will not detail all its array here, but I do not want to be heard as blurring distinctive aspects of the many modes of dispute resolution under the ADR umbrella. As Frank Sander's metaphor makes plain, there are differences among forms of ADR.

While the current vocabulary of ADR could enable a lengthy discussion of distinctions among processes now called arbitration, court-annexed arbitration, mediation, med-arb, mini-trial, summary jury trial, early neutral evaluation, and judicial settlement conferences,³¹ all of these forms involve the state's introduction to the disputants of a third party, who is called upon to do something.³² Therefore, I will group the various methods into modes that are delineated by the nature of the work of that third party.

A first mode is quasi-adjudicatory; this form of ADR offers a truncated, abbreviated fact-finding process that yields an outcome, decided by a third party, in the hopes that with that result, the parties will conclude their dispute. Both private contractual and court-annexed arbitration fit this mode. The difference is that under contractual arbitration, individuals or entities have an agreement, predating a dispute, to arbitrate, and that agreement also specifies the mechanism for selection of arbitrators. In contrast, under many court-annexed arbitration programs, litigants are sent to arbitration without such prior agreements and have varying amounts of

³⁰ See generally STEPHEN GOLDBERG, FRANK E.A. SANDER & NANCY ROGERS, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 1-240 (2d ed. 1992).

³¹ See, e.g., *id.* at 4-5 (table of dispute processes and identifying some nine forms and examining them by characteristics including degrees of formality, whether binding or non-binding, and whether public or private).

³² See also Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEG. STUD. 1, 1 (1995) (noting variation among forms of ADR, but also that all "share the feature that a third party is involved who offers an opinion or communicates information about the dispute to the disputants").

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control over the selection of arbitrators. Court-annexed arbitration typically permits parties to reject the arbitrator's decision and litigate, albeit sometimes with penalties and disincentives. However, if the parties do not object, the judgment of the arbitrator functions as a judgment of the court.³³

Under both court-annexed and contractual arbitration, the assumption is that information, provided to an outsider, will enable that outsider to render a fair outcome. What makes this process *not* adjudication is that the proceeding is not conducted by a state-employed individual who bears the title "judge," formal evidentiary rules do not apply, and opinions are often not written.³⁴ It is, however, important to keep in mind that this process shares with adjudication a commitment to a case-specific outcome made by a third party and predicated upon an inquiry into the claims of fact made by disputants.

A second mode of ADR also relies upon some third party intervention but for a different purpose. A third party is introduced not to make a decision, but rather to inform the disputants of how outsiders view the dispute and how these outsiders would decide, were they asked to do so. The hope is that with such information, the disputants themselves will obviate the need for third party intervention by settling their differences. That settlement, however, is presumed to have been shaped in light of the views of the outsiders. The views of those outsiders, in turn, are presumed to have been shaped by the information that the parties' provided in a format akin to adjudication. In both "summary jury trials" and "mini-

³³ Deborah Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 U. CHI. LEGAL F. 399. Under 28 U.S.C. § 658 (1988), ten federal district courts have the authority to mandate arbitration in particular kinds of cases and an additional ten have authorization to create voluntary programs. Both are nonbinding proceedings. As of 1993, eight of the ten districts authorized to have voluntary programs had been operating such programs for more than a year. DAVID RAUMA & CAROL KRAFKA, *VOLUNTARY ARBITRATION IN EIGHT FEDERAL DISTRICT COURTS: AN EVALUATION* (Fed. Jud. Center, 1994). See also BARBARA S. MBIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (Fed. Jud. Center, 1990). As part of the research for this lecture, I surveyed the eight federal districts in which voluntary arbitration programs are currently ongoing. According to the information provided, in five of the eight programs, parties may select their own arbitrators; four rely on a single arbitrator while two offer a choice between use of a single arbitrator, or a three person panel. The data provided by Rauma and Krafka summarize the programs somewhat differently, illustrating the difficulties of capturing dynamic programs. RAUMA & KRAFKA *supra* at 10-11, Table 2.

³⁴ Arbitration under some systems includes the issuance of awards in writing, with a summary of issues. See, for example, the description of the New York Stock Exchange Guide on arbitration, as set forth in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991). See also 2 CCH New York Stock Exchange Guide 4311-4327, Rule 627(e)-(f) (1992).

trials," information comes either from witnesses or with arguments by lawyers or litigants.³⁵

A third form of ADR moves further away from formal modes of information development. Conversation (sometimes called mediation, sometimes called a conference, sometimes called evaluation) is employed to elicit agreement by the parties. Judge-run settlement conferences are an example of this genre of ADR, as are "early neutral evaluations" ("ENE").³⁶ In this form of ADR, the relationship between information and outcome may be obscure, in part by virtue of the absence of formal articulation by the third party of its views of the respective positions of the disputants. Reaching agreement is one goal, as is the narrowing of the dispute, should further proceedings or adjudication be needed. When settlements take place, it is because of parties' consent, which may or may not track their legal rights.³⁷

³⁵ See Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6 (1993). Robert F. Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 271 (1985) (discussing mini-trials; when Chief Judge of the Northern District of California, Judge Peckham was an early and vocal advocate of judicial management and ADR in general).

³⁶ David I. Levine, *Northern District of California Adopts Early Neutral Evaluation to Expedite Dispute Resolution*, 72 JUDICATURE 235 (1989) (describing ENE and its implementation); William D. Underwood, *Divergence In the Age of Cost and Delay Reduction: The Texas Experience With Federal Civil Justice Reform*, 25 TEX. TECH L. REV. 261, 311-12 (1994) (describing ENE).

³⁷ See, e.g., Janet Cooper Alexander, *Do the Merits Matter: A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991) (undertaking an empirical study of settlements of securities class actions and concluding that settlements were achieved by virtue of incentive structures not tightly linked to the legal and factual merits of the cases). But see Joel Seligman, *The Merits Do Matter*, 108 HARV. L. REV. 438, 453, 457 (1994) (arguing that Alexander's study relies on a "statistical[ly] insignificant . . . small sample"; and that "authentic data" about the role of private litigation in securities law enforcement is insufficient to support curbing such cases). A vivid example of a settlement expressly detached from legal right comes from Judge Jack Weinstein's work in the Agent Orange litigation. His efforts produced a \$180 million settlement for the class, which he then approved. *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D. N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom. Pinkney v. Dow Chem. Co.*, 484 U.S. 1004 (1988). Thereafter, Judge Weinstein dismissed the claims of those who had "opted out" — on the grounds that these individuals had no legal claim, that as far as he could then tell, dioxin did not cause their injury. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1229 (E.D. N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied sub nom. Lombardi v. Dow Chem. Co.*, 487 U.S. 1234 (1988) ("[The] most serious deficiency in plaintiffs' case is

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Some commentators have attempted to limit the use of the term ADR and resist its application. For some, settlement programs or judicial management are not properly classified as ADR; for others, criteria are imposed to qualify a program as ADR.³⁸ The impulse to constrain the vocabulary stems from a variety of concerns, including that too much is being packaged as ADR, confusing the analysis, and that certain forms of intervention, such as judicial engagement with the parties to search for settlement, would be better described as "creative judicial management" ("CJM") or settlement efforts, and separately considered, rather than subsumed within the ADR framework.

The effort to peel settlement programs away from ADR is, in my view, hard to sustain. Settlement remains a central purpose of many forms of ADR, including those not styled "settlement conferences."³⁹ Even those forms of ADR closely resembling adjudication, such as court-annexed arbitration, rely on parties' acceptance of the outcomes (a form of settlement) rather than parties' insistence on adjudication. Moreover, many within the legal community include settlement efforts as part of their own descriptions of the reasons for ADR,⁴⁰ or link various forms of ADR to

their failure to present credible evidence of a causal link between exposure to Agent Orange and the various diseases from which they are allegedly suffering.").

³⁸ See, e.g., Deborah R. Hensler, *A Glass Half Full? A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 U. TEX. L. REV. ____ (forthcoming, 1995) (reserving "the term ADR for procedures for resolving disputes in litigation that, compared to the traditional litigation processes of adversarial negotiation, settlement, and trial, enhance parties' control over litigation outcomes or process.") (emphasis in original); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 897-98 (1991) (while ADR has "many connotations," limiting her discussion to "court-annexed arbitration, summary jury trials, mediation, and early neutral evaluation").

³⁹ See Garth, *supra* note 11, at 369 (discussing the "various artifices designed to promote settlements" and "increased judicial activism to compel parties to reach a settlement" as well as court-annexed arbitration, early neutral evaluation, mini and summary jury trials, economic settlement incentives, and malpractice mediation). See also FED. R. CIV. P. 16, Advisory Committee's Note to the 1993 revisions ("Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures, such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits.").

⁴⁰ See, e.g., District of Massachusetts, *Alternative Dispute Resolution*, Local Rule 16.4 (adopted, Nov. 18, 1991) (discussing mandatory settlement conferences as well as "other alternative dispute resolution programs"); Memorandum of Susan Keilitz, State Justice Institute, on "State Justice Institute Grant List," (Mar. 21, 1994) (listing "Alternative Dispute Resolution Projects" funded: "Judicial Settlement: development of a New Course Module,

court management and settlement.⁴¹ Hence, the discussion that follows considers settlement programs as a species of ADR.

The concern about the way in which an overflowing "ADR basket" can make mushy an analysis is a different kind of criticism, one well taken in many contexts. Were this essay an inquiry into the quality of outcomes or processes of ADR, it would be necessary to consider each form individually and not to speak of ADR as a "generic." However, my interest here is in the relationship between ADR in its generic form, as an idea of an alternative regime (much as Professor Sander sought) to state-based adjudication. Because the legal establishment's promotion of the variety of forms of ADR has generally been as a package, it is appropriate within the confines of this lecture to consider ADR as an undifferentiated set of processes.

IV. THE CONTOURS OF THE NEW FRAMEWORK

Over the past decades, the proposals for ADR have turned—with the assistance of many federal and state judges—into law. Below, I delineate some of the ways in which ADR has become "legalized" and institutionalized. As I develop the discussion of the "law of ADR," I will also begin my discussion of the attitudes toward and claims made about the nature and quality of both alternative dispute resolution and adjudication.

A. Supreme Court Doctrine: Revising Rules on the Legality of Contracts to Arbitrate

Opinions of the United States Supreme Court, separated by almost three decades, offer a first set of comparisons. The context is court enforcement of contracts to arbitrate disputes, involving federal statutory rights, *outside*

Film and Instrument Manual," "Analysis of the Civil Settlement Process," and "Judicial Settlement" (on file with *Ohio State Journal on Dispute Resolution*). See generally Robert J. MacCoun, E. Allen Lind & Tom R. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts*, in HANDBOOK OF PSYCH. & L. 95 (D.K. Kagehiro & W.S. Laufer eds., 1992) (reviewing research on "several major court-administered ADR procedures," including "fee-shifting rules, small claims mediation, victim-offender mediation, judicially mediated plea bargaining, judicial settlement conferences, court-annexed arbitration, and summary jury trials.").

⁴¹ See, e.g., Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239, 239 & n.3 (1987) (acknowledging the "warrant for equating settlement and ADR" as well as the distinctive means by which ADR "devices differ in how they relate to settlement").

the courts.⁴² My subsequent discussion is about alternative dispute resolution *within* the courts. While that distinction is important in terms of legal doctrine, the changes in the Supreme Court's descriptions of the function of both private alternatives to adjudication and adjudication itself provide insight into the legal establishment's contemporary acceptance of court-based ADR.

In 1953, in *Wilko v. Swan*,⁴³ the United States Supreme Court held that a customer of a brokerage firm who claimed he had been fraudulently "induced" to buy stock⁴⁴ had a right to litigate a claim of violation of the Securities Act of 1933, notwithstanding that the customer had signed a contract to arbitrate future disputes. The Court rested its decision on an interpretation of Congress—that the Securities Act itself precluded such agreements.⁴⁵

Two concerns influenced this reading of the securities statute in Justice Reed's opinion for the Court. The first was the Court's fear of arbitrators' potential *arbitrariness*: that unlike a person who bore the name "judge," an arbitrator was potentially lawless. While an arbitrator might, at some level, be governed by law, the arbitration itself was not a process obliged to enforce federal law.⁴⁶ The trial court in *Wilko* had used the phrase "looser approximations" of rights⁴⁷ to capture this concern.

⁴² In addition to the discussion above, about the arbitrability of federal statutory claims, another line of cases considers the reach of the Federal Arbitration Act and its relationship to state law. Recently, the Supreme Court reiterated its position that the Federal Arbitration Act, 9 U.S.C. § 2 (1947), preempts state arbitration law (invalidating a predispute arbitration contract) when a contract "evidenc[es] a transaction affecting interstate commerce," and does not turn on whether the parties to the contract "'contemplated' an interstate commerce connection." *Allied-Bruce Terminix Cos. v. Dobson*, 115 S. Ct. 834, 837 (1995) (citing 9 U.S.C. § 2 and reaffirming *Southland Corp. v. Keating*, 465 U.S. 1 (1984)). Consistent with its current view that arbitration of federal statutory claims is favored, *see infra* notes 52-63 and accompanying text, the Court stated in *Allied-Bruce* that "the purpose of the Federal Arbitration Act is to overcome courts' refusals to enforce agreements to arbitrate." *Id.* at 838.

⁴³ 346 U.S. 427 (1953).

⁴⁴ *Id.* at 429.

⁴⁵ Justice Jackson concurred to explain that in his view, the Act did not prohibit arbitration agreements that were entered into *after* the controversy arose. *Id.* at 438-39.

⁴⁶ The majority did not explicitly agree with the lower court that an arbitrator's award could be vacated for failure to comport with the Securities Act and further noted the difficulties of ascertaining that such a failure had occurred. *Id.* at 436. Compare *Wilko v. Swan*, 201 F.2d 439, 445 (2d Cir. 1953). In contrast, dissenting Justices Frankfurter and Minton argued that "[a]rbitrators may not disregard the law." *Wilko*, 346 U.S. at 440.

⁴⁷ *Wilko v. Swan*, 107 F. Supp. 75, 78 (S.D. N.Y. 1952) (quoting *American Almond Prods. Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944)).

A second concern that animated the Court's refusal to enforce an agreement to arbitrate was anxiety about the adequacy of negotiations between parties. The Court noted that, while courts and legislatures might find arbitration a reasonable mode of dispute resolution, parties could be coerced into turning to arbitration; as a consequence, the "validity" of the agreement to arbitrate was in issue.⁴⁸ Justice Reed spoke of the "surrender" of rights and of the "advantages" provided by federal law. In the Court's view, a security buyer's "surrender"—prior to a claimed violation—would necessarily have been made at a time when the buyer was "less able to judge the weight of the handicap" of ceding a place in the litigation queue than would the adversary, the brokerage firm.⁴⁹

Three assumptions, central to *Wilko*, were key to its intellectual framework. First, arbitration was assumed to be something *different* from and less loyal to law than adjudication. Second, public judgments rendered by federal trial courts on factual questions, such as the claim of fraudulent inducement of a client by a firm to purchase stock, in individual cases, were viewed as desirable *mechanisms* of social regulation. Third, the judiciary viewed with skepticism the agreements of parties; parties' agreements were *insufficient*, in and of themselves, to valorize all the decisions embodied in those agreements.

For almost thirty years, these assumptions formed something called a "public policy" objection to arbitration of federal statutory claims—an objection that became embedded in the case law and that moved from the securities context to the antitrust context and then to other federal statutory regimes. The arbitrator as dispute resolver was posited as a potential hazard to the state, as lawmaker. As a consequence, when litigants sought to avoid agreements to arbitrate federal statutory claims, they were able to persuade judges of the necessity of permitting adjudication—not arbitration—to ensure that principles of federal law would guide the outcome of the dispute.⁵⁰ Implementation of this position took two forms; one approach permitted litigants to avoid the arbitration itself, while another permitted litigants who had been to arbitration to avoid the preclusive effect of those decisions and to litigate federal statutory claims.⁵¹

During the 1980s, however, the Supreme Court changed its mind. The Court, once again describing itself as interpreting congressional intent, reached a different understanding of that intent. On rereading, it turned out

⁴⁸ *Wilko*, 346 U.S. at 432.

⁴⁹ *Id.* at 427.

⁵⁰ MACNEIL, *supra* note 2, at 63-64. Several essays in law reviews recount this approach, including Stewart Sterk's *Enforceability of Agreements to Arbitrate, An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981).

⁵¹ See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284 (1984).

that Congress was for, rather than against, arbitration in the context of federal regulatory regimes. Initially, *Wilko* was narrowed; in Justice O'Connor's words, it was to be read as "barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights."⁵² Then, *Wilko* was flatly overruled.⁵³ Public policy no longer prohibits arbitration; rather, public policy welcomes arbitration of federal statutory claims.

Along the path of this doctrinal shift, the three assumptions embodied in *Wilko* were revised as well. Recall the first, a view of arbitration as different from adjudication and potentially lawless. From the vantage point of the 1980s, the prior generation's emphasis of difference was cast in a negative light, as "suspicious" and "mistrust[ful],"⁵⁴ and properly to be replaced with a "healthy regard for the federal policy favoring arbitration."⁵⁵ The current assumption is that arbitration is sufficiently similar to adjudication so as to serve as its equal. "Arbitral tribunals" (as they came to be named) are now lauded for their capacity to handle "complexities," such as antitrust law.⁵⁶ Moreover, attributes of arbitration (its relative informality, its reduced use of discovery, its disinterest in precedent) that were formerly perceived to be undesirable became the very elements now lauded as "streamlined,"⁵⁷ "flexible," "prompt", and

⁵² *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 220 (1987) (relying on the Court's 1975 holding, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), which had upheld the enforcement of an arbitration agreement that had been entered into as a part of an international contract before the dispute arose and that involved a claim under the Exchange Act).

⁵³ The cases typically cited as the route by which the *Wilko* doctrine met its demise are *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989); and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Professor MacNeil also links the Supreme Court's ruling in *Southland Corp. v. Keating*, 465 U.S. 1 (1984) to these cases, for in upholding the arbitrability of a claim under state franchise law, the Court implicitly weakened the prohibition on arbitration of legislatively created rights. See MacNeil, *supra* note 2, at 73-77.

⁵⁴ *Shearson/American Express*, 482 U.S. at 231, 233. See also *Rodriguez*, 490 U.S. at 480 (describing *Wilko* as illustrative of Judge Jerome Frank's comment about "the old judicial hostility to arbitration" from *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

⁵⁵ *Gilmer*, 500 U.S. at 26 (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

⁵⁶ *Shearson/American Express*, 482 U.S. at 232.

⁵⁷ *Id.*

"efficient".⁵⁸ The tone in some contemporary opinions is that opponents or skeptics of arbitration are outmoded, "far out of step" with current thinking.⁵⁹

The second assumption that *Wilko* exemplified was that adjudication was a mechanism for regulation and rights pronouncement. This assumption has also been revised. No longer are the regulatory goals of the state of paramount interest in adjudication. "[I]mportant incidental policing function[s]" take a back seat to the goal of responding to individual claims of the need for compensation.⁶⁰ Arbitration and adjudication are again equated: both are interested in the resolution of individual disputes and, with such resolution, both "further broader social purposes."⁶¹

And finally, no longer are parties' agreements to arbitrate to be scrutinized by the courts, nervous about inequality of bargaining and suspicious of "surrender." Rather, once having made a bargain, the parties "will be held to their bargain."⁶² "Mere inequality in bargaining power" does not often undermine the agreements forged.⁶³

⁵⁸ "Although [arbitration] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'." *Gilmer*, 500 U.S. at 31 (citing *Mitsubishi*, 473 U.S. at 628).

⁵⁹ *Rodriguez*, 490 U.S. at 481. See also *Hearings on H.R. 1102*, *supra* note 10 (Statement of Judge Jerome B. Simandle of the United States District Court for the District of New Jersey, that while critical views of court-annexed arbitration "persist among a few academics and traditionalist judges;" these are "[a]bstract assertions" and "artificial critiques that ignore experience.").

⁶⁰ *Mitsubishi*, 473 U.S. at 635 (anti-trust claims); *Shearson/American Express*, 482 U.S. at 240 (RICO claims).

⁶¹ *Gilmer*, 500 U.S. at 28. In addition, the Court noted the availability of settlement in litigation as support for the proposition that adjudication is, like arbitration, aimed at dispute resolution. *Id.* at 32. Given this approach, Stewart Sterk's definition, in 1981, of when a public policy rationale should prevent arbitration works nicely; he argued that public policy forbid arbitration only when "at issue is a legislative expression or a basic case law principle designed for some purpose other than to foster justice between the parties to the dispute." Sterk, *supra* note 50, at 483. Under current interpretations, the governing purpose of statutory and judicial legal regimes is "to foster justice between the parties in dispute."

⁶² *Shearson/American Express*, 482 U.S. at 242; *Gilmer*, 500 U.S. at 26.

⁶³ *Gilmer*, 500 U.S. at 33. Of course, questions about specific agreements to arbitrate remain litigated in both federal and state courts and are forming the basis of critical commentary. One set of cases continues to explore themes of contracts of adhesion among parties with disparate bargaining power. Compare *Bell v. Congress Mortgage Co.*, 30 Cal. Rptr. 2d 205 (Ct. App. 1994) (denying enforcement of contract to arbitrate between refinancing homeowners and mortgage company) (depublished by the California Supreme

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Two changes have thus occurred over the last four decades. Intellectual frameworks about the role of adjudication as a public regulatory process and about the desirability of the state's reliance on parties' bargains as substitutes for adjudication have evolved. In addition, the descriptions of the goals, purposes, and natures of both arbitration and adjudication have changed. Arbitration is like adjudication because, under the revised model, regulation of conduct is neither central to arbitration⁶⁴ nor to adjudication of federal statutory rights. Arbitration becomes reconceived as a "tribunal" process, and adjudication is redescribed as a dispute resolution process, designed to bring closure to individuals' conflicts.⁶⁵

Court, July 28, 1994), *with* *Badie v. Bank of Am.*, 1994 WL 660730 (Cal. App. Dep't Super. Ct. 1994) (rejecting an injunction against the bank's policy of requiring arbitration for disputes between the bank and its account holders and credit card recipients). *See also* *Graham Oil Co. v. Arco Prods. Co.*, 1994 WL 701315, at *2-3 (9th Cir. 1994) (given Congress' concern about "gross 'disparity of bargaining power' between franchisors and franchisees and that a particular arbitration clause required "surrender" of statutory rights to recover exemplary damages, attorneys' fees, and statute of limitation protections, court invalidated arbitration clause).

Another group of cases relates to the validity of arbitration clauses in applications to register as a broker with the National Association of Securities Dealers (NASD). The Ninth Circuit found that a form's failure to "describe [the] disputes the parties agreed to arbitrate" and the specific failure to inform signatories of the waiver of one's right to litigation in "sexual discrimination suits" invalidated the agreement to arbitrate. *Prudential Ins. Co. v. Lai*, 42 F.3d 1299, 1305 (9th Cir. 1994). In contrast, the Tenth Circuit recently upheld such an agreement. *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994). *See also* Barbara Presley Noble, *Attacking Compulsory Arbitration*, N.Y. TIMES, Jan. 15, 1995, at F21 (lawsuit filed by former employee within securities industry challenges the requirement of arbitrating work-related claims).

An additional concern (in the context of general arbitration law) is about the power of arbitrators and the level of deference accorded their decisions. *See, e.g.*, *Advanced Micro Devices v. Intel Corp.*, 885 P.2d 994, 999-1000 (Cal. 1994) (requiring judicial deference "to an arbitrator's finding that determination of a particular question is within the scope of his or her contractual authority" to promote "the general rule of arbitral finality").

⁶⁴ *See* Edward M. Morgan, *Contract Theory and the Sources of Rights: An Approach to the Arbitrability Question*, 60 S. CAL. L. REV. 1059 (1987) (discussing Supreme Court arbitration decisions as prizing party autonomy over state objectives external to those parties).

⁶⁵ *See also* Kanowitz, *supra* note 41, at 258-69 (rejecting a "public/private" or "interests/rights" distinction and arguing that agreements to arbitrate can serve both sets of interests and that public interests are not themselves unitary). A less cheerful convergence between the two may be emerging: both arbitration and adjudication can be consumptive of resources. *See, e.g.*, *Advanced Micro Devices*, 885 P.2d at 998. (arbitration "lasted four and one-half years and included three hundred and fifty-five days of hearings."); Margaret A.

Watching case law doctrinal revisions (detailed above) and parallel shifts in statutes, rules, and procedures (to which I turn below) enables insight into underlying ideologies, of the role of and the rule of law, of theories of the meaning and import of parties' consent, and of the function, nature, and identity of courts. Of course, the changes are not smooth, and not without protest⁶⁶ and complexity.⁶⁷ I turn now to other developments

Jacobs, *Intel-Advanced Micro Case Stirs Debate Over Arbitrator's Powers*, WALL ST. J., Feb. 10, 1995, at B7 (Intel and Advanced Micro Devices each spent over \$100 million in legal fees during the arbitration).

⁶⁶ For example, in the context of arbitration doctrine, Justice Blackmun (joined by Justices Brennan and Marshall) dissented. As he put it (in the context of the Securities Act): "The Court . . . approves the abandonment of the judiciary's role in the resolution of claims under the Exchange Act and leaves such claims to the arbitral forum of the securities industry at a time when the industry's abuses toward investors are more apparent than ever." *Shearson/American Express*, 482 U.S. at 243 (Blackmun, J., dissenting).

Members of Congress have also responded to the judicial approval of arbitration. Representative John Bryant (a Democrat from Texas) introduced a bill to amend the Federal Arbitration Act to permit parties to a "sales and service contract" to reject arbitration at the time a dispute arises. Further, the proposed legislation would have compelled arbitrators to write decisions that would in turn have been subjected to judicial scrutiny upon a finding that the law was "disregarded." See The Voluntary Arbitration Act of 1993, H.R. 1314, 103d Cong. § 17 (Mar. 11, 1993).

⁶⁷ In addition to questions of adhesive contracts to arbitrate (*see supra* note 63), a second set of concerns focuses on the problems of litigation of employment discrimination disputes. See U.S. GEN. ACCT. OFF., EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES, GAO/HEHS-94-17 (March 1994) (discussing a lack of oversight of arbitrators and of rules, by the Securities and Exchange Commission, of discrimination cases filed in the securities industry); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993) (finding enforceable a law partnership agreement to arbitrate federal employment discrimination claims); Steven A. Holmes, *Some Employees Lose Right to Sue for Bias at Work*, N.Y. TIMES, Mar. 18, 1994, at A4.

A related issue is whether an arbitration precludes subsequent civil rights litigation. Some courts continue to cite *McDonald v. City of West Branch*, 466 U.S. 284 (1984), and *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36 (1974), for the proposition that federal statutory civil rights claims are not precluded by prior arbitrations. See, e.g., *Sutton v. Cleveland Bd. of Educ.*, 958 F.2d 1339, 1347 (6th Cir. 1992) (§ 1983 rights can be asserted without regard to contractual arbitration obligation). Compare *Bender v. A.G. Edwards and Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (Title VII claims can now be subjected to compulsory arbitration). See also *Farrel Corp. v. U.S. Int'l. Trade Comm'n*, 949 F.2d 1147 (Fed. Cir. 1991) (finding that agreements to arbitrate do not preclude administrative agencies from investigating complaints that have been subjected to arbitration). For proposals to exempt Title VII from the reach of *Gilmer*, see the Civil Rights Procedures Protection Act of

over the past four decades that need to be read alongside the revised view of private agreements to arbitrate rather than adjudicate federal statutory rights.

B. The Judiciary at Work: Judicial Management, Court-Annexed ADR, and the Settlement of Cases

To many “raised in the law” since the 1980s, it may seem ordinary that, as a part of their daily work, judges manage cases, encourage settlement, and urge parties to use various forms of ADR, from judicial settlement conferences to court-annexed arbitration. Thus, I need to underscore that the enthusiasm on the part of the judiciary and the vocal support of these forms of the judicial role are relatively recent phenomena. By way of comparison, consider an essay written only forty years ago by two well-known United States professors, Ben Kaplan and Arthur Van Mehren.⁶⁸ Returning from Germany in 1958, they described to a United States readership of lawyers, judges, and law professors how different German judges were from those in the United States. Consider the description of the foreign—German—judge. He was “constantly descending to the level of the litigants, as an examiner, patient or hectoring, as counselor and advisor, [and] as insistent promotor of settlements.”⁶⁹

Just forty years have passed, but now that description is apt for the United States federal trial judge as well. The change came about at first rather informally. In the 1950s and 1960s, judges, court administrators, and commentators extolled—particularly in large (“protracted”) cases—the virtues of case management and judicial assistance in settling cases.⁷⁰ In the

1994, S. 2045, 103d Cong., 2d Sess. (1994) (under which “powers and procedures” in Title VII could not be waived prospectively).

A third question is the relationship between federal mandates to arbitrate and state statutory rights. See *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239 (1994).

⁶⁸ They were joined by a third co-author, Rudolf Shaefer, a German judge. Benjamin Kaplan, Arthur T. Von Mehren, & Rudolf Shaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. 1193 (Part I), 1443 (Part II) (1958).

⁶⁹ *Id.* at 1472.

⁷⁰ See Alfred P. Murrah, *Foreword to the Proceedings of the Seminar on Protracted Cases*, 21 F.R.D., 395-96 (1957) (discussing the organization of the first seminar on protracted cases); *Resolutions Adopted at the Seminar on Protracted Cases*, 23 F.R.D. 319, 614-15 (1958) (“The judge assigned should at the earliest moment take *actual control* of the case . . .”) (emphasis in original); Joseph A. Navarro & Jean G. Taylor, *An Application of Systems Analysis to Aid in the Efficient Administration of Justice*, 51 JUDICATURE 47 (1967); William T. Becker, *Efficient Use of Judicial Resources*, 43 F.R.D. 421 (1967); Herbert L. Will, Robert Merhige & Alvin Robin, *The Role of the Judge in the Settlement Process*, 75

1970s, Frank Sander's theme of alternative dispute resolution emerged. By 1983, judicial engagement with these alternatives was institutionalized in amendments to Rule 16 of the Federal Rules of Civil Procedure,⁷¹ which as written in the 1930s, had provided a trial court with discretion to convene a pretrial conference.⁷² In contrast, the 1983 amendments required judges to schedule pretrial conferences. The topics to be addressed included "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."⁷³

A decade later, in 1993, Rule 16 was again amended, to detail further the judicial role in managing the pretrial process, controlling discovery, structuring trials, and helping parties to settle cases. By these revisions, judges were authorized to require parties or their representatives to be at conferences or available by phone "to consider possible settlement of the dispute."⁷⁴ Moreover, the 1993 amendments revised the description of ADR (in 1983 termed "extrajudicial procedures") by describing it as "special procedures to assist in resolving the dispute when authorized by statute or local rule."⁷⁵ ADR thus moved inside the courts.

The national federal rules are not the only source of guidance for district judges, nor the only means by which to measure change. Local rulemaking and informal innovation are both important sources of procedural alterations. Local rulemaking is a robust enterprise, in which

F.R.D. 203 (1977). See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). See also Marc Galanter, *The Quality of Settlements*, 1988 J. DISP. RESOL. 55, 56-57 (citing judicial speeches from the 1970s that praise settlement).

⁷¹ *Supreme Court of the United States, Order Promulgating Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 165, 201-13 (Apr. 28, 1983).

⁷² "In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider . . . the simplification of the issues; . . . [amending] the pleadings; . . . obtaining admissions of fact . . . ; limit[ing] . . . expert witnesses; the advisability of a preliminary reference of issues to a master for findings . . . ; such other matters as may aid in the disposition of the action." HARRY GRAHAM BALTER, *FEDERAL RULES OF CIVIL PROCEDURE: ANALYZED AND ANNOTATED* 40 (Parker & Baird, 1938) (quoting FED. R. CIV. P. 16).

⁷³ FED. R. CIV. P. 16(c)(7) (1983). Rule 16 (a)(5) includes "facilitating the settlement of the case" as one of the possible objectives of the pretrial conference.

⁷⁴ See *United States Supreme Court, [Promulgated] Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 401, 427-31 (effective Dec. 1, 1993) (Rule 16(c)).

⁷⁵ Compare FED. R. CIV. P. 16(c)(7) (1983) with FED. R. CIV. P. 16 (c)(9) (1993). The 1993 Advisory Committee's note explains that the revision "describe[s] more accurately" procedures aside from "traditional settlement conferences" that "may be helpful in settling litigation." FED. R. CIV. P. 16(c)(a) (1993) (Advisory Committee's note).

districts detail a myriad of rules.⁷⁶ Evidence of the enthusiastic response in some districts to the judicial settlement role can be found in these local rules. For example, the District of Massachusetts requires that: "[a]t every conference conducted under these rules, the judicial officer *shall* inquire as to the utility of the parties conducting settlement negotiations, explore means of facilitating those negotiations, and offer whatever assistance that may be appropriate in the circumstances."⁷⁷

While local rulemaking captures ADR efforts in various districts, case law is also a place in which to find ADR, particularly in large scale litigation. From that genre of cases, one learns that ADR is not only a feature of the pretrial process; some forms of ADR are also elements of remedial provisions in large scale cases. Judges have approved the incorporation of ADR in many of the "claims facilities" created as a part of settlements of cases such as those involving the Dalkon Shield, Agent Orange, and asbestos.⁷⁸

The changes over the past fifteen years in Rule 16 mark the alteration

⁷⁶ Those rules are authorized by Fed. R. Civ. P. 83 and further encouraged in light of the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482, discussed *infra* notes 96-97 and accompanying text. As of the late 1980s, local rulemaking had resulted in more than 5000 local rules, many of which varied in significant respects from the national set. See Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1570 (1991); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999 (1989).

⁷⁷ District of Mass., Expense and Delay Reduction Plan, Article IV, Rule 4.02, D. Mass. Local Rule 16.4(B) (rules adopted Nov. 18, 1991) (emphasis added). The rule also notes that the judge assigned to the case (and who would preside at trial, if one occurred) may refer a case to another district or to a magistrate judge to conduct settlement conferences. In addition, and anticipating the revisions of the national rule, the Massachusetts local rule states that "whenever a settlement conference is held, a representative of each party who has settlement authority shall attend or be available by telephone." *Id.* See FED. R. CIV. P. 16(c) as amended by the 1993 amendments ("If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.").

⁷⁸ See Symposium, *Claims Resolution Facilities and the Mass Settlement of Mass Torts*, 53 L. & CONTEMP. PROBS. 1 (Francis E. McGovern ed., 1990). See also Peggy McCollum, *Dalkon Shield Claims Resolution Facility: A Contraceptive for Corporate Irresponsibility?* 7 OHIO ST. J. ON DISP. RESOL. 351 (1992) (criticizing the facility for its secrecy). Compare Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found?)*, 61 FORDHAM L. REV. 617 (1992) (explaining, as the Trust's Chair, its procedures and responding to criticism). For concern that many of the so-called ADR programs are really not procedures aimed at enhancing litigant participation, see Hensler, *supra* note 38.

of the judicial role. Although not all judges are enthusiasts,⁷⁹ many vocal jurists are pressing for expanding authority over the pretrial process and increased opportunities for alternative resolution methods.⁸⁰ Some judges have become identified as proponents of particular forms of ADR. Judges such as the Honorable Raymond Broderick of the Eastern District of Pennsylvania, Thomas Lambros of the Northern District of Ohio, Arthur Spiegel of the Southern District of Ohio, and Richard Enslen of the Western District of Michigan, have expressed their appreciation for processes such as summary jury trials and court-annexed arbitration, both of which rely on the introduction of non-judge third parties, to respond to the development of factual or legal information.⁸¹ Other judges are eager to expand the role of the judge as mediator. Wayne Brazil, Federal Magistrate Judge in the Northern District of California, offers guidance on how to conduct settlement conferences,⁸² and Charles Richey, Federal District Judge in the

⁷⁹ See, e.g., G. Thomas Eisele, *Differing Visions, Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Courts*, 46 SMU L. REV. 1935 (1993) (Special Edition: Alternative Dispute Resolution and Procedural Justice). In addition, some judges call for reforms not in management, but in adjudication itself. See, e.g., Roger J. Miner, *Federal Court Reform Should Start From the Top*, 77 JUDICATURE 104 (1993) (arguing that legal uncertainty is a major source of the caseload growth and that the Supreme Court has played an unfortunate role in issuing opinions that are neither clear nor easy to follow).

⁸⁰ See, e.g., Robert M. Parker & Leslie J. Hagin, "ADR" Techniques in the Reformation Model of Civil Dispute Resolution, 46 SMU L. REV. 1905 (1993) (Special Edition: Alternative Dispute Resolution and Procedural Justice); Lambros, *supra* note 35, at 7; Peckham, *supra* note 35, at 255-60; Richard A. Enslen, *ADR: Another Acronym or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. REV. 1, 3-6 (1988).

⁸¹ See Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1989); Lambros, *supra* 35; Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789 (1989); Honorable S. Arthur Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986). But see Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (commenting on the costs of summary jury trial and questioning the use of jurors).

⁸² WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (1988); Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1 (1987). See also Michael R. Hogan, *Judicial Settlement Conferences: Empowering the Parties to Decide Through Negotiation*, 27 WILLAMETTE L.J. 429, 451-54 (1991) (Magistrate Judge Hogan of the United States District Court for the District of Oregon, explaining his settlement techniques); D. Marie Provine, *Settlement Strategies for Federal District Judges* (Fed. Jud. Center, 1986) (data from interviews of federal trial judges exploring methods for encouraging settlement).

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District of Columbia, extols the utility of those conferences.⁸³ Yet others, such as Robert Parker (formerly of the Eastern District of Texas and now on the Fifth Circuit), call for mandatory ADR, made part of the process early in the life of a lawsuit.⁸⁴ A student commentator captures some aspects of these activities by entitling a law review essay: "Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts."⁸⁵

While a good deal of material thus documents judicial interest in ADR, it is difficult to quantify both the embrace of ADR and the extent to which practice has changed. A debate exists about whether the rhetoric of ADR overshadows its employment. Professor Kim Dayton has argued that ADR is a "myth," in that relatively few programs are in place in individual districts, and relatively few cases are affected.⁸⁶ Recent studies echo her findings that not all federal courts have active ADR programs.⁸⁷ Moreover,

Seminars are also offered to enhance judges' ability to resolve disputes. *See, e.g.,* Institute for Dispute Resolution, Pepperdine University School of Law, Judicial Mediation Skills (offered June 9-11, 1994) (materials on file with *Ohio State Journal on Dispute Resolution*).

Despite such judicial enthusiasm, some question the utility of the effort. *See, e.g.,* Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1388-89 (1994) (arguing that there is "no basis for thinking judicial promotion leads to a number of settlements that is sufficiently higher than would otherwise occur to compensate for the opportunity costs of the judicial attention diverted from adjudication," and that "[w]e simply do not know if judicial intervention improves the quality of settlements.").

⁸³ Charles R. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525 (1991) (praising the court's enhanced authority under Rule 16).

⁸⁴ Parker & Hagin, *supra* note 80, at 1913-14.

⁸⁵ William L. Adams, Note, *Let's Make a Deal: Effective Utilization of Judicial Settlements in State and Federal Courts*, 72 ORE. L. REV. 427 (1993).

⁸⁶ Dayton, *supra* note 38, at 917-18 & n.165 (concluding from her 1978-88 research that 11 of 94 districts could be classified as "ADR districts," defined as referring at least five percent of their civil filings to ADR; also arguing that ADR implementation has been uneven and that its ability to lower costs and increase the speed of resolution have not been demonstrated). *See also* RAUMA & KRAFKA, *supra* note 33 (discussing range of ADR programs in federal district courts); MEIERHOEFER, *supra* note 33 (same).

⁸⁷ In 1995, the Federal Judicial Center (FJC) will be publishing a sourcebook listing ADR programs. According to FJC staff, about a third of the federal courts report having mediation programs; almost all describe themselves as having settlement conferences. Telephone interview with FJC staff member (Jan. 5, 1995). For discussion of the role of such programs in federal courts, see Donna Stienstra & Thomas E. Willging, *Alternative Dispute Resolution: Why They Do and Why They Do Not Have a Place in the Federal Trial Courts*, (Fed. Jud. Center, forthcoming Spring, 1995) (manuscript on file with *Ohio State Journal on Dispute Resolution*). Contained therein is also information on the time judges devote to such

if ADR is confined to a particular set of programs (such as excluding judicial settlement efforts), then the spread of ADR is greater on paper than in the federal courts.⁸⁸ Finally (and assuming judicial settlement efforts are within the ADR rubric), a baseline problem exists: we cannot uncover what federal trial judges thought to be the appropriate level of permissible engagement in settlement negotiations or in urging ADR procedures during the nineteenth and early twentieth century,⁸⁹ or whether there even was a shared approach.

But we do know that the rule structure for federal judges in 1938 neither discussed with any specificity nor urged trial judges to superintend settlement negotiations and explore ADR. In 1994, settlement is part of the federal trial judge's job description, and the mandate comes from rules shaped by judges and lawyers⁹⁰ who have advocated such changes. As this

programs. See *id.* Table 2, Judge and Magistrate Time Reported for ADR and Settlement Activities. See also RAUMA & KRAKA, *supra* note 33 (not all districts eligible to have either mandatory or voluntary nonbinding arbitration programs have such programs nor do high levels of participation exist uniformly). In contrast to this discussion of the use of ADR, a 1994 report from district courts on their efforts to implement the Civil Justice Reform Act (see *infra* note 96) indicated that 86 percent of the districts had "adopted authorization to refer appropriate cases to various court designated alternative dispute resolution programs, including mediation, mini-trial, and summary judgment." *Civil Justice Reform Act Report Submitted to Congress*, 26 THE THIRD BRANCH, Dec. 1994, at 9.

⁸⁸ According to a very preliminary review undertaken by Donna Stienstra of the Federal Judicial Center, as of 1994, twenty federal district courts have authorized and/or use early neutral evaluation programs; forty-nine use mediation programs; thirty-one have court-annexed arbitration, eight have case valuation programs, and eight have settlement weeks. Thirteen districts have no specific programs but general encouragement of ADR. Of the 94 districts, eleven had none of the above programs. Letter from Donna Stienstra, The Federal Judicial Center, to Judith Resnik (Jan. 18, 1994) (noting limits of data that may provide an oversimplified picture) (on file with *Ohio State Journal on Dispute Resolution*). These data will be revised and reported when the FJC publishes its sourcebook on ADR in 1995. Additional data will also become available when the Institute for Civil Justice of RAND completes its review of the implementation of the Civil Justice Reform Act (discussed *infra* note 104), which authorizes ADR.

⁸⁹ Recall MacNeil's caveat, *supra* note 3 and accompanying text. See also Galanter, *supra* note 70, at 56-57 (arguing that judicial admiration for settlements predates the "modern ADR movement."). Compare Provine, *supra* note 82 (describing in 1986 "broad and accelerating movement toward more judicial involvement in the settlement process").

⁹⁰ See, e.g., Katrina M. Dewey, *A White Knight to ADR's Rescue*, CAL. L. BUS., Sept. 13, 1993, at 16 (describing Robert Raven, ABA president in 1988-89, who was active in promoting ADR and institutionalizing ABA support for ADR). See also AMERICAN BAR ASSOCIATION, DISPUTE RESOLUTION PROGRAM DIRECTORY 1993 (guide published annually);

century ends, judges and lawyers debate less about whether ADR is good and more about who should initiate ADR, who may attend,⁹¹ and whether it should be mandatory.⁹² The Chief Justice of the United States Supreme Court contrasts a "traditional view" of the federal courts with a model of the "future federal courts as comprehensive justice centers, offering consumers a whole menu of dispute resolution procedures."⁹³ ADR has become a part of the judicial process and no longer stands apart from it.⁹⁴

C. Congressional Promotion of ADR and ADR's Use in Administrative Agencies

The Federal Rules of Civil Procedure are largely the work product of the judiciary, acting through its special committees. These rules come into being by virtue of congressional inaction.⁹⁵ But Congress has not been silent in the ADR conversation. Over the past few years, many members of Congress have also voiced enthusiasm for ADR, and some of their views have become part of legislation. The Civil Justice Reform Act of 1990 reiterated by statute the aspiration that district courts use ADR.⁹⁶ This

Robert D. Raven, *Alternative Dispute Resolution: Expanding Opportunities*, 43 ARB. J., June 1988, at 44 ("ADR has truly come of age."); Galanter & Cahill, *supra* note 82, at 1342-46; WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* (1985).

⁹¹ See, e.g., *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) (permitting no right of access to summary jury trials). From the eight responses received to my questionnaire addressed to federal courts with voluntary arbitration programs, two districts reported that anyone could attend the proceedings (held in court rooms); three reported that parties and/or the arbitrator decided; and three clerks reported not knowing. In one of those districts, no arbitrations had yet been held, and the district's rules were silent on the issue.

⁹² See *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993) (vacating trial court order obliging summary jury trial participation); *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987) (overturning a trial judge's mandate of parties to participate in summary jury trials); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1.

⁹³ Chief Justice William H. Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 WIS. L. REV. 1, 8-9.

⁹⁴ As Carroll Seron put it, "an adjudicatory model is no longer the sole center of . . . court practice." Seron, *The Impact of Court Organization on Litigation*, 24 L. & SOC'Y REV. 451, 463 (1990). See also LINDA R. SINGER, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 165-68 (2d ed. 1994).

⁹⁵ See The Rules Enabling Act, 28 U.S.C. § 2072 (1990).

⁹⁶ See 28 U.S.C. § 473(a)(3)(A), and (a)(6)(B) (1990), which call for the Advisory

legislation is the major statement by Congress on civil processes of the last decade.⁹⁷ Its stated purposes are to reduce delay and expense, and alternatives to trial and adjudication are important aspects of the legislation.

A related piece of legislation is the Administrative Dispute Resolution Act of 1990 ("ADRA")⁹⁸ which requires each federal agency to "adopt a policy that addresses the use of alternative means of dispute resolution and case management."⁹⁹ The act instructs agencies to consider using ADR at all phases of their work, from rulemaking and enforcement actions to agency adjudication.¹⁰⁰ The ADRA is predicated upon congressional "findings" of ADR's desirability. Congress believed ADR to be "faster, less expensive, and less contentious," and that ADR could generate "more creative, efficient, and sensible outcomes" than does "litigation in the Federal courts."¹⁰¹ This legislation represents a "government wide emphasis" on ADR.¹⁰² Like ADR in the federal courts, programs existed in

Groups constituted under the CJRA to formulate civil justice expense and delay reduction plans to consider, as basic principles, that judicial officers explore the "parties' receptivity to, and the propriety of, settlement . . ." and that the plans authorize courts to "refer appropriate cases to alternative dispute resolution programs." Further, much of the focus of the plan is judicial control, management, settlement, and ADR. While the CJRA has relatively little focus on adjudication, juries, and trials, a Task Force convened by Senator Biden developed what became a first draft of the legislation; its report included more discussion of trials than did the resulting legislation. See JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 2, 9 (Brookings, 1989).

⁹⁷ In 1988, Congress amended the Rules Enabling Act to ensure more public access and information, but those changes do not represent a major reformulation of the basic framework. For discussion of ongoing congressional involvement in civil procedure over the past two decades, see Judith Resnik, *Civil Litigation in the Twenty-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199, 1201-03 (1993) (including Margaret A. Berger, Kenneth R. Feinberg, Ralph K. Winter, Deborah R. Hensler, Stephen N. Subrin, Elizabeth M. Schneider, and Jeffrey W. Stempel).

⁹⁸ 5 U.S.C. §§ 581-593 (1990) (current version at 5 U.S.C. §§ 571-583 (1992)).

⁹⁹ 5 U.S.C. § 581 note (1990) (Promotion of Alternative Means of Dispute Resolution section (a)) (current version at 5 U.S.C. § 571 (1992)).

¹⁰⁰ 5 U.S.C. § 581 note (1990) (Promotion of Alternative Means of Dispute Resolution section (a)(2)) (current version at 5 U.S.C. § 571 (1992)).

¹⁰¹ 5 U.S.C. § 581 note (1990) (Congressional Findings section (3)-(4)) (current version at 5 U.S.C. § 571 (1992)).

¹⁰² S. REP. NO. 543, 101st Cong., 2d Sess., 1990 U.S.C.C.A.N. 3931, 3932 (June 1, 1990). For discussion of earlier efforts by agencies to rely on informal processes, see Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482 (1987). For discussion of agency adjudicative problems, see Alan W. Heifetz, *ALIS, ADR, and ADP: The Future of Administrative*

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agencies before legislation authorized their use.¹⁰³ Like ADR in the courts, commentators report uneven implementation,¹⁰⁴ but the aspiration for expansive use remains strong.¹⁰⁵

ADR within the courts remains on the congressional agenda. In 1993 and 1994, some members of Congress urged mandating that each district court provide court-annexed arbitration programs.¹⁰⁶ The Judicial

Adjudication, 1 WIDENER J. PUB. L. 13 (1992).

¹⁰³ See Bernard V. Parrette, *The Contract Disputes Act and the Administrative Dispute Resolution Act: A Richness of Remedies, Finally Ready for Trial?* 20 PUB. CONT. L.J. 293 (1991) ("[A]ll ADR methods, including the equivalent of binding arbitration, have been available in the public contract sector" in Board of Contract Appeals "for some time."). See generally ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987).

¹⁰⁴ See Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Reform Recommendations*, 43 DUKE L.J. 1165, 1174 (1994). For discussion of how to evaluate the programs instituted, see ELIZABETH ROLPH & ERIK MOLLER, *EVALUATING AGENCY ADR PROGRAMS: A USER'S GUIDE TO DATA COLLECTION AND USE* (ICJ, RAND, forthcoming, 1995) (manuscript on file with the *Ohio State Journal on Dispute Resolution*).

¹⁰⁵ Lubbers, *supra* note 104, at 1174 (urging expanded reliance on ADR). There is some irony to the sense that agency decision making is in need of revision. In the 1940s, agencies were promoted as a desperately needed alternative to adjudication. See, e.g., Samuel I. Rosenman, *Public Papers and Addresses of Franklin D. Roosevelt*, 9 PUB. PAPERS 616-18 (1941) (when vetoing the "Bill Regulating Administrative Agencies," Roosevelt described court procedures as costly and over technical, and agencies as providing simple, informal, and less rigid alternatives).

Now, in the 1990s, the view is that ADR is needed for agencies. Proponents of these changes have also noted that agencies were to be the expeditious alternative to adjudication. See *Hearings on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations*, 101st Cong., 2d Sess. 34 (1990) (Statement of Dan Glickman, Democrat from Kansas) [hereinafter *Glickman Statement*]; *Hearings on H.R. 2497 Before the Subcommittee on Administrative Law and Governmental Relations*, 101st Cong., 2d Sess. 91 (1990) (Statement of Philip J. Harter on behalf of the American Bar Association). See also Senator Charles E. Grassley and Charles Pou, Jr., *Congress, the Executive Branch and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 12 (Agencies have "gradually ossified, transformed from a 'cure' to being part of the problem.").

¹⁰⁶ One version of the Court Arbitration Authorization Act of 1993, H.R. 1102, 103d Cong., 1st Sess. (Oct. 12, 1993) would have amended 28 U.S.C. § 651(a) to state that "Each United States district court shall authorize by local rule the use of arbitration in civil actions, including adversary proceedings in bankruptcy, . . ." Cases eligible would have included those with amounts in controversy up to \$150,000. As Representative William J. Hughes of New Jersey subsequently explained, in his view, "mandatory programs were far more

Conference of the United States objected and argued that such programs should be optional with district courts.¹⁰⁷ A second issue is not whether to mandate that courts offer such programs but whether, if such programs exist, to mandate that litigants whose cases qualify be required to use court-annexed arbitration before being permitted to return to the "traditional" adjudicatory mode.¹⁰⁸ Congress's current, interim response has been to continue the authorization of twenty districts, ten of which may only provide voluntary non-binding court-annexed arbitration and ten of which may, at their option, mandate participation in such programs. Congress has thus accommodated the judiciary's concerns and reauthorized the current court-annexed programs without requiring that all districts put such activities into place.¹⁰⁹

successful than the voluntary programs." 140 CONG. REC. E 14 (daily ed., Jan. 25, 1994). See *infra* note 107 on the subsequent course of the legislation.

¹⁰⁷ *Key Legislative Initiatives Advance in Congress*, 25 THE THIRD BRANCH, Oct. 1993, at 3, 5. The proposed provisions to mandate that district courts have arbitration programs were promptly amended to make such programs optional with the district courts. See the Court Arbitration Authorization Act of 1993, H.R. 1102, 103d Cong., 1st Sess. (Oct. 13, 1993). A summary of objections to a congressional mandate of arbitration in every district can be found at 139 CONG. REC. S 16573 (daily ed., Nov. 19, 1993) (statements of Senator Heflin).

The ABA also objected. Responding to H.R. 1102 in its August 1994 meeting, the ABA's House of Delegates "voted loudly by voice to condemn mandatory arbitration for any class of claims in federal court." *ABA Seeks Lawyer Input on Rules Drafting, Nixes Mandatory Court-Annexed Arbitration*, 63 U.S.L.W. 2097, 2098 (Aug. 16, 1994).

The Senate did not pass companion legislation to the House's 1993 bill, but then approved an extension of the extant programs. See S. 1732, A Bill to Authorize Pilot Court-Annexed Arbitration for Another Year (Nov. 19, 1993). The House thereafter enacted comparable legislation, 139 CONG. REC. H 10975 (daily ed., Nov. 22, 1993), and the extension became law on December 14, 1993. 139 CONG. REC. D 1395 (daily ed., Dec. 14, 1993). In 1994, Senator Heflin introduced S. 2524, the Voluntary Alternative Dispute Resolution Act of 1994, that proposed permitting (not requiring) districts to adopt voluntary court-annexed arbitration programs, with no penalties for litigants exercising their rights to trial de novo. S. 2524, 103d Cong., 2d Sess. (Oct. 6, 1994).

¹⁰⁸ See, e.g., Statement by Representative Hughes, *supra* note 106; Katz, *supra* note 92.

¹⁰⁹ See the Judicial Arbitration Act, Pub. L. No. 103-192, 107 Stat. 2292 (1993), amending 28 U.S.C. §§ 651-58 to extend the date of expiration of the authorization for court-annexed arbitration programs from November of 1993 until December 31, 1994; Judicial Amendments Act of 1994, Pub. L. No. 103-420, 108 Stat. 4343 (Oct. 24, 1994), extending authorization until 1997.

D. The Executive and ADR

Civil justice reform efforts have also been the focus of the Executive branch. The Bush Administration promulgated an Executive Order¹¹⁰ that required government attorneys to seek to settle cases. That Executive Order also called for increased use of ADR.¹¹¹ Although there is dispute about both what animated the Executive's interest in this area¹¹² and the degree to which the Executive actually committed itself by this Order to do anything specific, there is no question about the Executive's rhetorical posture, which joined its co-branches of government in praising ADR. Members of the Clinton Administration have also adopted a pro-ADR stance. Vice President Al Gore's report, *Creating a Government that Works Better & Costs Less: Improving Regulatory Systems*,¹¹³ acknowledged the propriety of litigation at times, but also praised alternatives as sometimes generating "better results than might otherwise occur."¹¹⁴

E. The Legalization and Institutionalization of ADR

Let me pause to summarize. In 1976, Frank Sander called for more modalities of dispute resolution—based in the courts. His call has been more than heard; it has become law. Via legislation, national and local rule making, and executive proclamation, every branch of the federal

¹¹⁰ Exec. Order No. 12778 (Oct. 23, 1991), 56 Fed. Reg. 55195 (1991).

¹¹¹ The Order required such involvement only upon the government concluding that such use would lead to a "prompt, fair, and efficient resolution." See Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12778, Office of Att'y Gen., 57 Fed. Reg. 3640, 3641 (Jan. 30, 1992).

¹¹² Compare Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992) (criticizing the "empirical underpinnings" as "shaky" and that proposals are aimed at "chang[ing] the current balance between individual plaintiffs and corporate defendants, in favor of the latter. That agenda is a political one . . .") with Gregory B. Butler & Brian D. Miller, *Fiddling While Rome Burns: A Response to Dr. Hensler*, 75 JUDICATURE 251, 254 (1992) (stating that reforms will "reduce the burden of excessive, needless litigation"). See also Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 687-88 (1993) (describing the efforts of then Vice President Dan Quayle to press for reforms in civil litigation).

¹¹³ (Office of the Vice President, Sept. 1993) (Accompanying Report of the National Performance Review).

¹¹⁴ *Id.* at 47-48. See also Use of Alternative Dispute Resolution, 59 Fed. Reg. 30368 Dep't of Interior, Off. of Sec. (June 13, 1994) (explaining notice of interim ADR policy).

government has signalled its support of ADR. While the pattern of implementation is varied¹¹⁵ and the discussion of it encompasses a range of procedures, approval in theory of ADR has become commonplace.¹¹⁶

The current legal issues are not whether ADR is a desirable mode for courts and agencies to adopt or whether courts should play a role in encouraging parties to settle and to explore a variety of procedures to help them achieve an agreement. Rather, today's issues are what forms of ADR should be adopted, what kinds of settlement programs are acceptable, what kinds of disputes are appropriate to which forms of ADR,¹¹⁷ whether ADR providers are (like judges) immune from suits and the reach of their jurisdiction,¹¹⁸ and how to increase use of ADR procedures.¹¹⁹ Discussion

¹¹⁵ That is not to say that implementation of that legal regime is complete. *See supra* notes 86-87, 104 and accompanying text.

¹¹⁶ Commentators differ on both whether ADR has in fact been met with warmth by lawyers and if so, why. For example, Laura Nader has argued that what she terms "harmony ideology—the use of a rhetoric of peace through consensus—finds fertile ground with the legal profession" Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-form Dispute Resolution*, 9 OHIO ST. J. ON DISP. RESOL. 1, 1 (1993). In her Schwartz lecture, Professor Nader argued that "ADR rhetoric . . . was a response to the law reform discourse of the 1960s, a discourse concerned with justice and root causes," and she linked efforts within legal education, the leadership of the Chief Justice of the United States Supreme Court, publicity efforts directed at practicing lawyers, and therapeutic rhetoric of healing as the factors that lead lawyers to become advocates of ADR. *Id.* at 3, 8-25. Nader's commentary prompted a defense of mediation. *See* Carol J. King, *Are Justice and Harmony Mutually Exclusive? A Response to Professor Nader*, 10 OHIO ST. J. ON DISP. RESOL. 65 (1994), which in turn was met by a rejoinder. Laura Nader, *A Reply to Professor King*, 10 OHIO ST. J. ON DISP. RESOL. 99 (1994).

¹¹⁷ *See* Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

¹¹⁸ *Wagshal v. Foster*, 28 F.3d 1249, 1251-54 (D.C. Cir. 1994) (holding that such immunity attached to mediators and "case evaluators"); *Mills v. Killebrew*, 765 F.2d 69 (6th Cir. 1985) (finding immunity).

¹¹⁹ *See, e.g.,* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993) (analyzing forms of participation that could be required); RAUMA & KRAKA, *supra* note 33, at 23-24 ("opt in" and "opt out" voluntary arbitration programs); Shavell, *supra* note 32, at 5-7, 16-19 (discussing analysis of incentives created by ex ante agreements to use ADR and ex post requirements to do so); Katz, *supra* note 92, at 51-55 (concerns over coercion); SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION (SPIDR), MANDATED PARTICIPATION AND SETTLEMENT COERCION: DISPUTE RESOLUTION AS IT RELATES TO THE COURTS 1-3 (1991) (Committee chaired by Nancy Rogers, examining mandatory ADR; while supporting it in "non-binding disputes" under specified conditions, also concerned about coercion to settle,

centers about the permissible and impermissible incentives to settle, such as the imposition of penalties for "failure" to settle,¹²⁰ the legality of vacating prior court judgments to facilitate parties' settlements,¹²¹ the barriers to settlement,¹²² and the capacity of a court to approve a settlement of a class action, styled as representing all "future" potential asbestos claimants and providing what has been called in such large mass torts "global peace."¹²³

V. THE INTERRELATIONSHIP BETWEEN CLAIMS MADE FOR ADR AND VIEWS OF ADJUDICATION

The transformation of the civil process from one disinterested in ADR to one that both welcomes and has made ADR its own could not have occurred without arguments made on behalf of ADR. While my commentary thus far has adverted to the claims made for ADR, I turn now to analyze those arguments. Below I detail differing kinds of claims made on behalf of ADR.

As in my discussion above, this analysis could proceed by mapping specific claims made about different forms of ADR; that approach would highlight the differences among ADR techniques¹²⁴ and would be an appropriate analytic mode of addressing whether a claimed attribute of ADR

be on the obligatory nature of the process but on whether it is "abusive" or not. See Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR,"* 19 FLA. ST. U. L. REV. 1, 25 (1991). For consideration of the pros and cons of ADR in the federal courts, see Stienstra & Willging, *supra* note 87.

¹²⁰ See William W. Schwarzer, *Fee-Shifting Offers of Judgment An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

¹²¹ See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, (1994); Neary v. Regents of the Univ. of California, 10 Cal. Rptr. 2d 859 (1992). See generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

¹²² See, e.g., Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) (criticizing models of settlements that fail to consider attitudinal views of disputants as incomplete, and using undergraduate college students to test hypotheses about the effects on settlement of the "framing" of an offer, of the status of parties and their interests in equity seeking, and of who initiates settlement offers).

¹²³ *Georgine v. Amchem Prod., Inc.*, 157 F.R.D. 246 (E.D. Pa. 1994) (approving settlement of class action on behalf of all persons exposed to asbestos but who had not filed suit as of 1993).

¹²⁴ See *supra* section III.

can be empirically validated,¹²⁵ whether promoting ADR is wise social policy,¹²⁶ or whether one can explain a particular change in doctrine and statutes.¹²⁷ I am, however, not here interested in debating whether ADR "works"¹²⁸ nor what it actually is (which of course entails enormous

¹²⁵ One might, for example, compare the claims made by Judge Broderick, *supra* note 81, at 217-18, on behalf of court-annexed arbitration, and the FJC's evaluation by MEIERHOEFER, *supra* note 33, with the critiques posed by Lisa Bernstein and Robert MacCoun. See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2211 (1993) (there is "no conclusive evidence" that court-annexed arbitration will "reduce either the private or social cost of disputing"); Robert J. MacCoun, *Unintended Consequences of Court Arbitration: A Cautionary Tale from New Jersey*, 14 JUST. SYS. J. 229, 230 (1991) ("arbitration is likely to divert many more cases from settlement than from trial"). One could examine the enthusiasm for judicially-run settlement conferences in light of Carrie Menkel-Meadow's analysis that empirical evidence does not support either "efficiency or reduction of delay" claims, but that such settlements might enhance the quality of resolutions. See Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 497-98, 509-14 (1985). Or one could compare Judge Lambros's view of summary jury trials, *supra* note 35, with that of Judge Posner, *supra* note 81, at 377-85. See generally MacCoun, Lind & Tyler, *supra* note 40.

¹²⁶ See, e.g., Stephen M. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HAST. L.J. 1 (1992); Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43; Shavell, *supra* note 32; Galanter & Cahill, *supra* note 82, at 1387-91.

¹²⁷ For example, in the context of contractual arbitration, Professor MacNeil explains the Supreme Court's change in approach in the last two decades as animated by "docket-clearing pure and simple. That is the Court is motivated to reduce the cases having to be tried by the judicial system, particularly in the federal judicial system." MACNEIL, *supra* note 2, at 172-73 (commenting that "nowhere does the Court admit to such a policy," borne from its own "vested interests").

¹²⁸ Examples of such discussion can be found in the essays of Judge Enslen, *supra* note 80, and Judge Kaufman, Irving R. Kaufman, *Reform for a System in Crisis: Alternative Dispute Resolution in the Federal Courts*, 59 FORDHAM L. REV. 1, 22-38 (1990); see also Judge Broderick, *supra* note 81 (evaluating efficiency and participant approval of the CAA program in the Eastern District of Pennsylvania). For critiques of such claims, see generally Dayton, *supra* note 38; Keith O. Boyum, *Does Court-Annexed Arbitration "Work"?*, 14 JUST. SYS. J. 244 (1991); James L. Guill & Edward A. Slavin, *Rush to Unfairness: The Downside of ADR*, 28 JUDGES J. 8 (1989); Galanter, *supra* note 70, at 59-82 (evaluating arguments for settlement). Marc Galanter and Tom R. Tyler raised concern about the ability to engage in these comparisons. Marc Galanter & Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes, Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419, 420 (1989). Galanter rejected the effort to evaluate, a priori, either adjudication or settlement and urged regulation of settlements for quality. Galanter, *supra* note 70, at 82-84.

variation).

I take a different tack, in part because discussions of ADR's attributes often proceed by invoking all methods simultaneously and primarily because I am not interested in proving or disproving the merits of any particular form of ADR but rather in understanding what are claimed to be its advantages, in general, as compared to adjudication. Further, just as ADR is a set of processes that could be differentiated internally, so are ADR proponents a diverse group, holding a range of political and social visions. Because my interest here is not, however, about distinctions within ADR but about how the debate on behalf of ADR illuminates contemporary understandings of adjudication,¹²⁹ and about the interconnections between developments within adjudication and the promotion of ADR,¹³⁰ the organization of this section also does not reflect whether a claim is made on behalf of a particular group of ADR proponents, such as those identified with empowerment of communities, or with feminism, or with corporate enterprises.

Thus, the discussion below maps differing kinds of benefit perceived to be conferred by ADR and the relationship between that benefit and what adjudication is supposed to afford. Because ADR's success is often marked by distinguishing ADR from adjudication, attitudes about what adjudication does and does not do can be found, sometimes explicitly and other times implicitly, in discussions of ADR.¹³¹

A. Explanations Supporting ADR and Their Reflections on Adjudication

One could read the rules and statutes on ADR as a national referendum, standing for the proposition that the conclusions reached by ADR in general and by settlement in particular are either equal to or better than those achieved by adjudication by either judge or jury. What is particularly

Tyler believed that reliance on current trial-based systems as the baseline is improper.

Below, as I discuss some of the specific claims made on behalf of ADR, I will note disputes that surround the efficacy of particular forms of ADR.

¹²⁹ As Judge Schwarzer has noted, "the context in which ADR has gained a significant role [is] a time in which courts find themselves under great pressure as well as close scrutiny." William W. Schwarzer, Keynote Address at the National ADR Institute for Federal Judges (Nov. 12, 1993) (on file with the *Ohio State Journal on Dispute Resolution*).

¹³⁰ See Yeazell, *supra* note 14, at 676-78 (describing the "connectedness and mutability" of procedure).

¹³¹ Similarly, claims made for adjudication ADR include arguments about the nature of ADR. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) and the response by Professor Kanowitz, *supra* note 41.

interesting is that some of the prominent proponents of this claim are themselves judges, whom we might have thought would be adjudication loyalists. What are the elements for the stature of ADR? Below I identify some of the distinct (yet often overlapping or interrelated) themes.

1. ADR as a Default Position

A major premise of one strand of ADR advocacy is that current adjudicatory procedures are simply inadequate to the task. ADR functions not so much as a good, in and of itself, but rather as a good because the system is in "crisis" and something is needed to fix it.¹³² ADR is one of many techniques of managing this crisis, and might be on an equal footing with other proposed curative measures, such as curtailing discovery rights or controlling abusive attorneys.¹³³

When ADR is proposed on these grounds, it is seen as a useful alternative because of the claim that ADR is cheaper and quicker than trial, which is the baseline often used in the discussion. For example, Judge Raymond Broderick, in an essay entitled "Court-Annexed Compulsory Arbitration: It Works," described the success he identified to be a reduction in costs to the litigants and the public and a reduction in time elapsed from filing to resolution.¹³⁴

¹³² The "system in crisis" approach is evident in the writings of several judges, including Parker & Hagin, *supra* note 80, at 1906; Broderick, *supra* note 81, at 217-18; Kaufman, *supra* note 128, at 2-3; and Enslen, *supra* note 80, at 33. Members of Congress have adopted a similar vocabulary. See, e.g., *The Judicial Improvements Act of 1990*, S. REP. NO. 416, 101st Cong., 2d Sess. 1-2 (Aug. 3, 1990) (Statement of Sen. Joseph Biden) (the administration of justice suffers from the "scourge of two related and worsening plagues . . . the costs of civil litigation . . . and a scarcity of resources"). Some academics have described the problem as a "crisis of confidence." See Jay Folberg, Joshua Rosenberg, & Robert Barrett, *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. REV. 343, 351 (1992). See generally Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

¹³³ This theme—ADR as one piece of a multi-faceted repertoire—is exemplified in the CJRA, discussed *supra* note 96 and accompanying text. ADR could be understood as on a par with efforts like discovery control or as a vehicle for discovery control. See, e.g., Boyum, *supra* note 128, at 246-48 (focusing on the factors used to evaluate whether ADR "works" is whether the use of discovery has been reduced); Kaufman, *supra* note 128, at 6 (noting that ADR is a response in part to lawyers using discovery to drive up the costs of the other side).

¹³⁴ Broderick, *supra* note 81, at 222-23. See also Glickman Statement, *supra* note 105, at 33 (ADR will help to resolve disputes "faster, cheaper"). In 1918, parallel justifications were offered for New York City's Municipal Court's conciliation and arbitration program. See Lauer, *supra* note 8, at 154 (such methods provide for the "amicable and expeditious disposal

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What is implicit (and sometimes explicit) about adjudication in this form of praise for ADR? One reading is that ADR is not intrinsically superior to adjudication. Necessity (caused by a range of factors, such as the number of judges and the number of disputes, the fees demanded by attorneys, or the current structure of litigation rules) but not preference requires the state's adoption of ADR.¹³⁵ A related premise is that, because adjudication is not able to fulfill its own promises, ADR becomes a means of making good on adjudication's aspirations. ADR thus takes on the attributes of adjudication. ADR becomes the means for enabling "access to justice" when adjudication fails.¹³⁶ Returning to Frank Sander's metaphoric

of litigation").

The claims that ADR reduces litigation costs or increases speed are contested. *See, e.g.,* Katz, *supra* note 92, at 1, 46 (ADR acts as a "new layer of administrative expense for courts and another layer of transaction costs for litigants"); Galanter, *supra* note 70 (settlement is not a cheaper alternative to the parties than adjudication; it is not ADR that works, but the deadlines that are an artifact of ADR that prompt settlement); Menkel-Meadow, *supra* note 125, at 494-98 (detailing the many studies, not supporting "convincingly the efficiency argument").

One issue is whose costs are affected—those of the litigants or those of the public. *See* E. ALLAN LIND, *ARBITRATING HIGH-STAKES CASES: AN EVALUATION OF COURT-ANNEXED ARBITRATION IN A UNITED STATES DISTRICT COURT* 37-40 (1990) (evaluating public and private costs separately). A second question relates to the baseline chosen: is the relevant comparison cases tried or cases not tried?

¹³⁵ *See* Resnik, *supra* note 97, at 1207 (Kenneth Feinberg's discussion of the need for the "judiciary, confronting clogged dockets, to develop more flexibility in fashioning mediation, settlement, arbitration, mini trials, summary jury trials, and other ways to get the cases resolved. . . . [I]t's an essential . . . because the courts are ill equipped to try these cases [mass tort cases] one at a time.").

¹³⁶ Not only did Sander justify his proposal in part on that basis, *see supra* note 19, but many other ADR proponents have invoked an access to justice theme. *See, e.g.,* Menkel-Meadow, *supra* note 119, at 6 (in the 1960s, ADR was advanced because of its qualitative-justice reasoning, which was based on "community empowerment, party participation, and access to justice"); *Administrative Dispute Resolution Act: Hearings on H.R. 2497 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 66 (1990) (statement of Marshall J. Breger, Chairman, Administrative Conference of the United States) [hereinafter *Breger Statement*] ("high cost of participation in the administrative process or court review . . . can freeze out smaller, less affluent interests").

See also Susan Silbey & Austin Sarat, *Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject*, 66 DENV. U. L. REV. 437, 450-52 (1989) (analyzing "access to justice" elements in ADR as adopting rhetoric but also attempting to change justice's forms); Harry Edwards,

multi-doored courthouse, the doors to ADR are opened because the door to superior court is perceived either to be functionally closed or slightly ajar.

Another reading of this form of support for ADR has a different focus. The claim that ADR is less expensive than adjudication may also entail the claim that litigation is unnecessarily expensive and wasteful.¹³⁷ Sometimes an ADR form is preferable because it provides a quicker, cheaper quasi-adjudication (i.e. court-annexed arbitration) and sometimes an ADR form is preferable because it eschews adjudication altogether. Under this view, ADR moves out from under; ADR is no longer a default position, but a practice preferred to adjudication, for it is a way to make the world "better."

2. ADR as More Congenial than Adjudication

A second form of praise for ADR is about its potential for kindness as contrasted (sometimes explicitly) with nastiness, which is associated with adjudication.¹³⁸ ADR is perceived to be friendly, flexible, and nicer than the uncivil exchanges that characterize litigation.

This congenial theme contains a bundle of claims, which is worth sorting through. One means by which ADR is believed to achieve a congenial tone is because some forms of ADR have the potential to reduce the role of attorneys.¹³⁹ Less lawyering is not only a way to minimize fees and thus make the process less expensive and speedier (linking this theme

Commentary: Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668, 672-74 (1986) (considering "docket clearing" claims and potential, as well as risks of ADR).

¹³⁷ *Breger Statement*, *supra* note 136, at 72 (without ADR, government agencies would "waste money in years of unnecessary litigation"). See also *Parker & Hagin*, *supra* note 80, at 1906 ("[j]ustice costs too much"); *Lambros*, *supra* note 35, at 8 (settlements following summary jury trials avoid the "hefty tab for witnesses, experts, and other costs associated with trials").

¹³⁸ Representative William Hughes, a Democrat from New Jersey and then Chair of the House's Committee on the Judiciary, put it this way: mediation and conciliation "may be better suited to produce lasting resolutions without enduring rancor," because they are "cooperative." *Administrative Dispute Resolution Programs: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (May 20, 1992). Judge Robert Zampano of the United States District Court for the District of Connecticut argues that "[a]lmost all aspects of the litigation process are painful and it is natural to seek to avoid them." *Provine*, *supra* note 82, at 92 (describing judicial "optimism" about settlement and "pessimism about trial").

¹³⁹ *Parker and Hagin* put forth a "reformation model" of ADR, in which the first stage in the "Litigation Track" would not involve parties' attorneys. *Parker & Hagin*, *supra* note 80, at 1915.

back to that of ADR as a default position), but less lawyering is also seen as more civilized and as more responsive to the problems at issue. A world with fewer lawyers is imagined to be less rigid and more inventive.¹⁴⁰ The assumption is that, without lawyers, the disputants are empowered to act, and with that empowerment, can shape solutions more responsive to their needs than third parties, in role as adjudicators, would impose.

The ADR-as-congenial set of claims is not wholly dependent upon the elimination of lawyers. Rather, ADR is also seen as beneficial when lawyers are present—to educate and civilize lawyers by focusing them on the needs of their clients. Some forms of ADR aspire to teach lawyers that initiating settlement negotiations and engaging in various forms of compromise are not signs of weakness.¹⁴¹ Other forms of ADR hope to provide clients with information directly, enabling clients to better monitor their lawyers who may not always be loyal agents. While adjudicatory modes increase parties' dependence on lawyers, ADR may, under this view, both lessen parties' dependence on lawyers and focus lawyers' attention more directly on parties' needs and interests.

ADR as a vehicle for more thoughtful and congenial exchanges is not only aimed at reframing how lawyers and disputants behave; ADR is also a means of changing judicial behavior. While rejecting the image of the judge as "passive" or as an "umpire," ADR proponents are not eager to embrace the nomenclature of the "activist judge." That term has (for some) negative connotations borne out of its association with judicial efforts to enforce structural injunctions involving schools, prisons, and mental hospitals.¹⁴² Instead, the image under ADR is of a gentler, more conversational judge, urging accommodation.

In the early 1980s, I termed some of the reformation of the judicial role the creation of "managerial judges."¹⁴³ Judge Enslen speaks of judicial accountability and responsibility.¹⁴⁴ The purpose of new labels is to capture

¹⁴⁰ *Breger Statement*, *supra* note 136, at 66 ("Citizens who are quite effective when attempting informally to persuade their colleagues or friends of the justness of their cause can become reticent when placed in a forum that forces them to present their views within procedural constraints designed for law school graduates.").

¹⁴¹ Enslen, *supra* note 80, at 27. See also the Honorable Gordon L. Doerflinger, *Taking Pre-Trial Conferences Seriously Under Time Standards*, 36-Feb B. B.J. 13, 13, 15.

¹⁴² See generally Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (detailing that, historically, courts have been involved in structural changes, but that it was not until the twentieth century civil rights era that courts engaged in that role on behalf of litigants such as prisoners).

¹⁴³ Resnik, *supra* note 70, at 378-79.

¹⁴⁴ Enslen, *supra* note 80, at 4-5. Supportive of judicial roles at settlement, Magistrate

change, to mark the breadth of the judicial role and the involvement of a judge from the filing to the disposition of a lawsuit. As the decade closes, another term has made its way in federal statutes: the Civil Justice Reform Act speaks of the obligations not of "judges" but of "judicial officers."¹⁴⁵ This reference underscores that ADR has not only redefined the role for judges but also has been one of several factors prompting Congress to authorize increased reliance on magistrate and bankruptcy judges, who lack life tenure. This array of judicial officers, now including both judges with Article III protections and those without, are all charged with encouraging parties to undertake ADR, to function sometimes as facilitators, sometimes as mediators, sometimes as super senior partners to lawyers on both sides of the cases.¹⁴⁶ The backdrop roles remain; judicial officers can also be sanctioners or adjudicators, which may either impede their facilitating work or provide greater incentives for parties to cooperate.

ADR is thus seen as a set of processes more comfortable than adjudication. Litigant satisfaction and enthusiasm for ADR mechanisms are cited as evidence of ADR's accessibility and intelligibility.¹⁴⁷ The

Judge Hogan speaks of the need for an "adaptivist" legal system. Hogan, *supra* note 82, at 433 (quoting S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION 151 (1985)).

¹⁴⁵ See 28 U.S.C. § 473.

¹⁴⁶ Some commentators raise concern that employing judges to conduct ADR may prompt coercive behavior in their pursuit of settlement. See, e.g., *Administrative Dispute Resolution Programs: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 25 (May 20, 1992) (The Honorable Leo Wagner, Magistrate Judge, N.D. Okla.) ("parties [may be] afraid to do anything but accept the suggestion of the judge who is going to try the case"); Katz, *supra* note 92, at 16 (unethical behavior by judges promoting settlement, including "delaying rulings, threatening penalties for not settling, . . . giving favorable rulings to the weaker side"). See also *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985) (reversing trial judge who sanctioned a litigant for settling during rather than before trial). Other commentators raise concerns about the absence of congressional authorization for some of the innovations judges have generated under the ADR rubric. See, e.g., Posner, *supra* note 81, at 386.

¹⁴⁷ Broderick, *supra* note 81, at 222-23 (surveying judges, lawyers, and litigants); E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 965-66 (1990) (finding that litigant satisfaction was highest in trial and in court-annexed arbitration, and lower when litigants were absent from negotiations, in either judge-run or bilateral settlement conferences); JANE W. ADLER, DEBORAH R. HENSLER & CHARLES E. NELSON, SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM (1983) at xiii-xiv (litigant satisfaction with program). But see Dayton, *supra* note 38, at 914-915 (questioning implications of such data).

informality of ADR and its potential for privacy are assumed to put parties at their ease, and with that ease, to bring about better resolutions. Conversation and cooperation replace conflict;¹⁴⁸ informality empowers.

Some of those who pursue ADR for its interactive qualities identify themselves as feminists or humanists. For some feminists, relying on cultural feminist claims about "women's ways,"¹⁴⁹ adjudication is grounded in "male" models of combat.¹⁵⁰ In contrast, ADR is seen as offering the opportunity for accommodation, and with it an escape from the win/loss hierarchy.¹⁵¹ Other feminists mistrust alternatives to adjudication—fearing that the interaction between some forms of ADR (emphasizing conciliation) and women's stereotypical socialization will make women too ready to agree and too vulnerable to pressures for consent.¹⁵²

The vision of ADR as communicative and congenial comes with a frank critique of many of the attributes of adjudication. The formality of adjudication is perceived as undermining open communication. The procedural requirements of adjudication are described as roadblocks to communication and to fairness.¹⁵³ The rights of public access and

¹⁴⁸ Lucy Katz points out the tension that mandatory ADR brings to this congenial theme; she further documents the shift in doctrine, from a view that one cannot compel conference, to the current regime of court-enforced mediation and negotiation obligations. See Katz, *supra* note 92, at 20-22.

¹⁴⁹ The work of CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) is frequently cited as exemplifying this view. See also MARY F. BELENKY, BLYTHE MCVICKER CLINCHY, NANCY RULE GOLDBERGER, JILL MATTUCK TARULE, WOMEN'S WAYS OF KNOWING (1986).

¹⁵⁰ Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21, 22, 26 (1984) (contrasting adjudication and mediation); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 763 n.28, 797-98 (1984) (invoking Carol Gilligan's work, but also noting "[w]hether a focus on the needs of both parties is a particularly female mode of problem solving is still unknown").

¹⁵¹ According to Professor Menkel-Meadow, non-adversarial negotiation requires skills such as "ascertain[ing] . . . clients' underlying needs," "explore" and "probe" via attentive listening, while adversarial negotiation (occurring within the "shadow of courts") is more focused on power and obtaining strategic advantage; reliance may be placed on "cloak[ing] real preferences" to avoid one's opponent taking advantage of that knowledge. Menkel-Meadow, *supra* note 150, at 802-4, 766, 778-80.

¹⁵² See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1582-83 (1991).

¹⁵³ *Breger Statement*, *supra* note 136, at 66 ("Formality also tends to place a premium on procedural expertise."). See also Parker & Hagin, *supra* note 80, at 1911-15 (urging less formality).

information are seen as intrusive on private parties, who might otherwise respond to the state in its role as facilitator of agreements. Adjudication is seen as a process that often brings out the worst in its participants, either because it distorts their abilities to pursue self-interest or because it defines self-interest in such a fashion that requires inflicting losses, rather than maximizing gains.

3. ADR as More Efficient than Adjudication

I turn now from claims of ADR as responsive to systemic problems, such as that of a workload crisis, dysfunction, and incivility, to clarify a sometimes overlapping claim, that ADR's responsiveness to the needs of the disputants makes ADR a better means of resolving disputes (and hence good for the system as well). This thesis comes from participants with different perspectives and varies to some extent with the kind of ADR at issue.

For those forms of ADR that are focused on settlement, three assumptions result in efficiency: first, settlements by parties are voluntary; second, the parties have better information than adjudicators; third, with information and volition, parties have the control to achieve outcomes that are better than those imposed by adjudicators.¹⁵⁴ Settlement-oriented ADR thus becomes a more efficient way to resolve disputes than adjudication.¹⁵⁵

¹⁵⁴ See, e.g., *Breger Statement*, *supra* note 136, at 79 (stating that the purpose of the Administrative Dispute Resolution Act was based "wholly on the principle of consent" and with that consent, parties could "shape procedures to meet their needs on a case by case basis"). Some of these themes can be found in Melvin Eisenberg's discussion of the desirability of negotiated disputes. See Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

For concerns about the quality of information, about information disparity among parties, and about the inefficiencies of bargaining, see Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325-26 (1994) (a critical source of power for mediators is to respond to parties' disparate information; mediators control information, "caucus" with the parties, and create "noise" by disclosing or refusing to disclose information); George Lowenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEG. STUD. 135, 140-41 (1993) (self-serving assessments of fairness—"ego-centric biases," and a host of other biases, result in inaccuracies in bargaining); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993). See also Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991) (examining verdicts to offer hypothesis on when bargaining fails to result in settlement).

¹⁵⁵ These claims have become the subject of debate. First, if the desired outcome is that which comes from voluntarism and private dealmaking, how does the intrusion by the state,

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As Marshall Breger, Chairman of the Administrative Conference put it: "Consensual solutions are by definition ones in which interested members of the public have participated and reached agreement. Far more than outcomes imposed by government agencies, solutions reached via ADR will have the support and understanding, and meet the real needs, of agencies and affected parties."¹⁵⁶ His views are echoed by federal district judge Robert Keeton: "Scratch a trial judge, and beneath the surface, more often than not, you'll find a believer in the proposition that if more judges followed his or her techniques, more cases would be settled, and to the mutual advantage of the parties who would otherwise be locked in combat, consuming their resources as well as those of the court system."¹⁵⁷

Consent is also assumed to have benefits beyond the immediate resolution of the problem. The premise is that if parties agree to and craft a resolution, long term compliance will result. Indeed, for some ADR proponents, volition is so central to ADR that ADR is at risk if it becomes a mandatory part of the state's apparatus.¹⁵⁸

Efficiency claims on behalf of ADR forms that are quasi-adjudicatory rest not on consent as much as on speed, accessibility, and on the quantum of procedure provided. Court-annexed arbitration is described as a quicker,

insisting on parties exploring settlement, affect outcomes? Second, if the crisis story is correct, and adjudication is simply unavailable, then settlements of disputes may not be the product of volition but rather of coercion, or some other set of incentives.

Third, what is the relationship between the parties' agreement and the state's law? See Alexander, *supra* note 37, at 575-77 (empirical review of small number of settlements in a set of federal securities class actions, all of which settled at almost the same one quarter of the potential damage; concluding that those settlements were not driven by either parties' choice or by the merits of the case, but by a "market in settlements," influenced by a variety of incentives of the many participants. Settlements were not an "accurate" reflection of injury discounted by risk and costs of trial, but were driven by the incentives of the participants, making these class actions function as insurance against market losses for a relatively small number of investors.). Alexander believed that "the claims that settlement is intrinsically preferable to adjudication and that any freely negotiated resolution is ipso facto an acceptable resolution are not persuasive in securities class actions." *Id.* at 568.

Other ADR critics argue that no empirical evidence validates the proposition that federally-sponsored ADR results in more settlements. See Dayton, *supra* note 38, at 928.

¹⁵⁶ Breger Statement, *supra* note 136, at 66.

¹⁵⁷ Robert E. Keeton, *The Function of Local Rules and the Tension With Uniformity*, 50 U. PITT. L. REV. 853, 861 (1989).

¹⁵⁸ See, e.g., Katz, *supra* note 92, at 3 (ADR should be voluntary); Bernstein, *supra* note 125, at 2239 (advocating private ADR, among other reasons because it allows parties to select their arbitrator and the rules to be used); Menkel-Meadow, *supra* note 119, at 53 (in order for ADR to work, it must be by the consent of the parties).

shorter, less formal trial.¹⁵⁹ Because efficiency is not simply equated with economy but also entails accuracy (or sufficient accuracy in light of reduced costs), claims made for scaled-down adjudication embody a serious critique of adjudication. The point made is that the outcomes are just as good, or good enough, with less process, less cost, less delay.

4. ADR as Fairer than Adjudication

The efficiency arguments for ADR are sometimes turned into or related to arguments about fairness. Both arguments (ADR as more efficient and ADR as fairer than adjudication) share a view that parties have superior access to and actual possession of information than do third party decision makers. From this vantage point, adjudication is seen as a technique that can both distract and confuse. Legal rules operate to frame debates in a fashion that obscures parties' goals and that results in either wins or losses, rather than a richer set of possible resolutions.¹⁶⁰ In contrast, ADR is seen as focusing on issues, relaxing the law, and thus providing more "just" results.¹⁶¹ In the words of a 1994 draft report of a committee of the federal judiciary: "Often, a fair settlement by the parties, with or without court involvement, is the preferable resolution for particular litigation."¹⁶²

The perceived fairness of ADR may, like the other claims detailed above, vary with the kind of program used. For example, proponents of

¹⁵⁹ Broderick, *supra* note 81, at 218.

¹⁶⁰ See, e.g., Menkel-Meadow, *supra* note 125, at 503-05; Menkel-Meadow, *supra* note 150, at 801-04; Eisenberg, *supra* note 154, at 643-46, 654-60.

¹⁶¹ See, e.g., Yardenna Hurvitz, *Power, Protection, and Family Law: ADR Produces More Equitable Results than the Adversarial System*, LEGAL TIMES OF WASH., May 9, 1994, at S33.

Again, disputes exist about the empirical bases for such claims, as studied in the context of particular forms of ADR. See, e.g., Katz, *supra* note 92, at 50 (summarizing critiques of ADR); Michelle Hermann, Gary Lafree, Christine Rack & Mary Beth West, *Summary: An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation*, in THE METROCOURT FINAL PROJECT: A STUDY OF THE EFFECTS OF ETHNICITY AND GENDER IN MEDIATED AND ADJUDICATED SMALL CLAIM CASES AT THE METROPOLITAN COURT MEDIATION CENTER, BERNALILLO COUNTY, ALBUQUERQUE, NEW MEXICO (Jan. 1993) (submitted to Fund for Dispute Resolution) (research on civil, non-jury litigation involving money and filed in Albuquerque, New Mexico; evidence that mediation results varied by ethnicity of participants); Alexander, *supra* note 37 (settlements not related to the legal merits of disputes).

¹⁶² LONG RANGE PLANNING COMM., JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 53 (Draft for Public Comment, Nov. 1994) [hereinafter PROPOSED LONG RANGE PLAN].

ADR as more fair may cite litigant reports of more satisfaction with court-annexed ADR than with judicially run settlement conferences at which they are not present,¹⁶³ and argue for court-annexed arbitration but not other forms of ADR. Moreover, not only may proponents argue on behalf of a particular form of ADR (such as mediation), they may also believe that those processes are inappropriate for particular kinds of cases.¹⁶⁴

Notice that both ADR as more efficient and ADR as more fair are dependent upon the revision of the 1950s assumptions exemplified by the *Wilco* case.¹⁶⁵ Recall those concerns—that the parties may not be bargaining equals, that certain parties had the potential to exploit the bargaining setting, and, further, that whatever the deals parties might make, those agreements might not accord with social regulatory goals. In the 1950s, the parties' views of their rights and obligations were not seen as the only set of issues at stake when federal courts' jurisdiction was invoked. Further, the capacity of the court to act in public was understood as instructing third parties. Now, forty years later, parties' agreements are often seen as both justifying and embodying the "right" response. Further, adjudication is now seen as aimed at resolution as much as regulation, thereby creating the means, first for equating the two forms of dispute resolution, and then for ADR to trump adjudication.

B. The Relationships: Complementary, Competitive, Conquering, or Indistinguishable?

While ADR proponents are making any or all of the arguments outlined above, they often also comment that they are not advocating changes in adjudication. Take for example the statement of Marshall Breger, head of the Administrative Conference and testifying on behalf of the Administrative Dispute Resolution Act of 1990. He praised ADR as faster, cheaper, better, more imaginative and creative than adjudication. At the same time, he stated that he was proposing "building in *complementary* resolution methods, not usurping current adjudicatory procedures. . . . ADR methods are simply voluntary options that offer additional routes to

¹⁶³ Lind, MacCoun, Ebener, Felstiner, Hensler, Resnik & Tyler, *supra* note 147, at 965-66.

¹⁶⁴ Grillo, *supra* note 152 (criticizing mandatory mediation in divorce and concerned that it disadvantages women); Lisa Lehrman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (believing that, while mediation in cases of wife abuse is harmful, adjudication also has severe limitations in these cases).

¹⁶⁵ *Wilco v. Swan*, 346 U.S. 427 (1953). See also *supra* notes 43-49 and accompanying text.

justice.”¹⁶⁶ The legislative history of that Act echoes his view: the ADR techniques “are intended to supplement—not replace or limit—existing dispute resolution practices and procedures.”¹⁶⁷ Similarly, Professor Carrie Menkel-Meadow enters the debate about the judicial role at settlement conferences “to maximize their usefulness without seriously threatening the appropriate role of judges in formal adjudication.”¹⁶⁸ The 1993 Report of the Society of Dispute Resolution Providers reiterates this theme: “[i]ncreased use of private dispute resolution processes should complement, not replace, continued efforts to improve the public justice system.”¹⁶⁹

At other points, ADR proponents claim not that ADR is supplementary to but that it mirrors adjudication. For example, rejecting criticism of ADR as a mechanism for private settlement rather than for public pronouncement,¹⁷⁰ ADR proponents argued that the image of adjudication has been distorted. “The vast preponderance of cases . . . are now settled without addressing any significant, or even recurring, issues of importance to society.”¹⁷¹

Two descriptions of ADR and adjudication can therefore be identified, both assuming compatibility but for different reasons. Under one vision, ADR and adjudication are distinct and complementary; one supplements the other. Under the other, the two forms are more similar than distinct. ADR is sufficiently close to adjudication that the two are compatible.

I think that the claim of supplementation will not be long lasting and that the claim of similarity is more complex than usually stated. ADR functions less as a court’s adjunct than as a competitor.¹⁷² My point here is

¹⁶⁶ *Breger Statement*, *supra* note 136, at 73 (emphasis in the original).

¹⁶⁷ S. REP. NO. 543, 101st Cong., 2d Sess., 136 Cong. Rec. at 3932. *See also* Sherman, *supra* note 119, at 2082-83, 2086 (litigation and ADR “have a great deal in common . . . Both place a high value on a rational approach to dispute resolution, fairness of process, and the centrality of party autonomy.”)

¹⁶⁸ Menkel-Meadow, *supra* note 125, at 486. *See also* Lambros, *A New Adversarial Model*, *supra* note 81, at 796 (“Settlement [assisted by ADR] and adjudication are complementary; they are *not* mutually exclusive, nor are they incompatible.” (emphasis in the original)). In her later essays, Professor Menkel-Meadow has seen more of the conflict. *See* Menkel-Meadow, *supra* note 119, at 32 (“The use of settlement activity in the courts should be understood as the clash of two cultures.”).

¹⁶⁹ SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, PUBLIC ENCOURAGEMENT OF PRIVATE DISPUTE RESOLUTION: IMPLICATIONS, ISSUES AND RECOMMENDATIONS 10 (Report #2 of the SPIDR Law and Public Policy Committee, 1993) (on file with the *Ohio State Journal on Dispute Resolution*).

¹⁷⁰ For such concerns, see Fiss, *supra* note 131.

¹⁷¹ *Breger Statement*, *supra* note 136, at 72.

¹⁷² Professor Edward Brunet makes a related point, in his essay, *Questioning the*

not primarily turf, about private litigants with resources purchasing adjudication from sources other than the state.¹⁷³ While federal and state judges perhaps should worry that they may lose in the competition for the "good" cases,¹⁷⁴ these judges (and others) should also attend to the competition about and among values. ADR—and especially the embrace of settlement—is both a product of and the means by which adjudication is both reframed and devalued in this political system.

Despite a friendly facade, implicit in many of the claims for ADR as "better" is a deeply-held criticism of the contemporary version of adjudication: that the outcomes produced are too expensive, too time consuming, not close enough to the merits, not responsive to parties' interests, not (in sum) "worth it."¹⁷⁵ The descriptive arguments on behalf of

Quality of Alternative Dispute Resolution, 62 TUL. L. REV. 1, 47-56 (1987) (analyzing the market for ADR and adjudication, describing ADR as both a competitor and as a partner, but finds the rivalry "dynamic," "positive" and "healthy" for dispute processing). Galanter and Lande also see the competition between public and private courts as potentially generative. Marc Galanter & John Lande, *Private Courts and Public Authority*, in 12B STUD. IN L., POL. & SOC'Y 393, 412-13 (Susan S. Silbey & Austin Sarat eds., 1992). I am less sanguine that the current ideological framing and constrained resources permit the creative dynamism to which these authors aspire. See also Garth, *supra* note 11, at 385-87 (discussing the "market" in dispute resolution and the effects of the current competition between public and private providers); Doris Marie Provine & Carroll Seron, *Privatization of Judicial Services*, 3 J. PUB. ADMIN. RES. & THEORY 319, 332, 334 (1991) (current "mood of crisis" diminishes focus on the "public, policymaking purposes" of courts and may "undermine the full, rich, and varied tasks of courts in the body politic.").

¹⁷³ Several organizations, including "JAMS" (Judicial Arbitration and Mediation Services), and "Judicate," provide private adjudication services. See Bernstein, *supra* note 125, at 2187-89 (describing these enterprises). Concerns include the potential for a "brain drain" of judges, fleeing the lower-paid public sector work for better pay and working conditions in the private sector, which may leave the public sector to litigants who cannot afford to opt out. See JUDICIAL COUNCIL OF CALIFORNIA, THE REPORT AND RECOMMENDATIONS OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON PRIVATE JUDGES 19-20 (1992); Kirk Johnson, *Public Judges as Private Contractors: A Legal Frontier*, N.Y. TIMES, Feb. 10, 1993, at B11. Others are concerned that poorer litigants will not fare as well as rich litigants when they participate in the private sector and that private courts lack accountability. Galanter & Lande, *supra* note 172, at 397-98 (summarizing objections). Another issue is what cases, within the public judging system, are tracked to less fulsome processes—a kind of de facto privatization or alteration of the "public" adjudication by delegation to staff. See Robel, *supra* note 11, at 899-900.

¹⁷⁴ See Garth, *supra* note 11, at 367; Robel, *supra* note 11, at 899-900.

¹⁷⁵ Galanter and Lande offer a related commentary—that the ADR "movement" is "held together" by its critique of adjudication, and that framed by intellectual roots in psychology

ADR make a normative claim about adjudication. One can track the relationship between the growth in interest in ADR and changes in adjudication as it has been conceived under the framework of the 1938 Federal Rules of Civil Procedure: the diminution of interest in adjudication's rights pronouncement and its capacity for fact finding and the pressures to transform adjudication, causing a melding of adjudication and ADR, sometimes into a simplified adjudication and sometimes into a settlement-oriented set of managerial procedures.¹⁷⁶

Having posited this relationship, I should also respond to questions about the links I have drawn between contemporary promotion of ADR and the frustration with and hostility to adjudication. One set of issues relates to causation, which (as I stated at the outset) is not my enterprise here.¹⁷⁷ Instead, I am interested in the interaction of two generic modes of dispute resolution, one styled "adjudication" and one styled "alternative dispute resolution"—even as we know that both are constructs, with internal distinctions, a variety of expressions, and a good deal of overlap.¹⁷⁸ Thus, the next question I need to explore is whether hostility to adjudication is *intrinsic* in the institutionalization at the end of the twentieth century of ADR by the state.

Several comments are in order. First, ADR proponents sought to imbed ADR into the state's processes. In their advocacy, many expressly denigrated adjudicatory processes. It is possible that, had ADR proponents not gone that route, not attempted to make ADR a part of the state's justice apparatus but had sought instead only that the state recognize the validity of extra-judicial ADR, that the aggression toward adjudication might have been damped down; perhaps coexistence might then have resulted. One cannot tell how an unfettered market would have valued the two forms of

and "ideologies of empowerment and self-knowledge," ADR "entrepreneurs" have promoted these alternatives. Silbey & Sarat, *supra* note 172, at 440-45.

¹⁷⁶ As Stephen Yeazell puts it, "Trials are an endangered species." Yeazell, *supra* note 14, at 667.

¹⁷⁷ For the view that the shift away from adjudication to "technocratic administration" is a response to structural conditions, including increased demand for the limited resources of courts and the lack of a radical reallocation of funds, see WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* 45-57, 81-89 (1990). See also Galanter & Cahill, *supra* note 82, at 1388 (in the context of settlements, proliferation of providers is as much a response to demand as a cause of demand).

¹⁷⁸ See, e.g., Robel, *supra* note 11, at 895-96 (the "privatization continuum"); Galanter & Lande, *supra* note 172, at 399-400 (charting the "dimensions of privatization"); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 424-27 (1987) (discussing the continuum of judicial and litigants' actions).

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dispute resolution because regulation has intervened to mandate that the state provide and litigants use ADR.

Second, ADR is by no means the only source of criticism about adjudication in general and its regulatory aspects in particular. The last two decades have witnessed a rise in anti-lawyer, anti-regulatory, anti-government rhetoric and sentiments. Had ADR emerged at a time when lawyers were not perceived as economically greedy, when the polity was celebrating governmental regulation, and when public and private officials lauded adjudication as the vehicle by which to police that regulation, the attitude toward ADR would likely have been different.¹⁷⁹ What has occurred has taken place in the context of distrust of government and promotion of privatization.¹⁸⁰ ADR has become linked to the general hostility to government decision making, and adjudication has been linked with the disdained regime of government as regulator.

Third, perhaps the negativity around adjudication could have been either submerged or unsuccessful, had adjudication proponents been themselves more visible and vocal. Intriguingly, many within the federal judiciary are participating in the ADR movement without having shaped the conversation to preserve much interest in the activities unique to judges. It is hard to find discussion of the value of elements attributed to adjudication: its attention paid to the individual instance, its effort to announce, explain, and generate public norms, its slowness, its labor intensive and messy activity of attempting to reconstruct events so as to attach the label "fact" from whence "law" and "judgment" can flow.¹⁸¹ Indeed, visible examples

¹⁷⁹ The reliance on agencies as ADR in the 1940s to the 1960s may be an example of this approach, that is of a continued expression of interest in legal rather than consensual results, but in the relocation of adjudicatory-like processes to another forum.

¹⁸⁰ In the context of health care reform, Rashi Fein describes this as a view that "places primary emphasis on government as the institution that structures (economic) incentives so as to encourage individual behavior associated with desired outcomes. It is a restricted view of government and a narrow view of the forces that motivate individual behavior." Fein, *supra* note 17, at 44.

¹⁸¹ Judge Eisele is a rare exception among judges. See Eisele, *supra* note 79. See also Judge Robert Keeton, *supra* note 157, (offering as a test of justice under Fed. R. Civ. P. 1's mandate that courts seek a "just determination:" that judges strive to ensure that "a dispute is resolved A) on the merits, and B) as determined by governing substantive law."); Judge Jack B. Weinstein, *Judges and Alternative Dispute Resolution* (Aug. 9, 1988) (speech before the ABA, Session on Judicial Power and ADR, Toronto, Canada, manuscript on file with the *Ohio State Journal on Dispute Resolution*) (concerned that courts must remain open, that judges should provide opportunities to vindicate substantive rights, and that the "American tradition" of rights to trial not be compromised by the imposition of penalties for trial, but also advocating an "affirmative role" for judges to encourage settlement); Jack B. Weinstein,

of rights announcement—in the context of school desegregation, criminal defendants' rights, and abortion—have been held up by some as exemplars of how adjudication fails.

Instead of a lively stream of celebratory commentary, prominent federal judges have played central roles in the promotion of an array of anti-adjudication events. Above, I detailed judicial promotion of ADR. In addition, many judges—such as Judge Richard Posner,¹⁸² former Judge Robert Bork,¹⁸³ and Justice Antonin Scalia¹⁸⁴—have also proposed the relocation of some federal judicial business, and specifically individual

Warning: Alternative Dispute Resolution May Be Dangerous to Your Health, LITIGATION, Spring 1986, at 6, 48.

Further, while there was federal judicial opposition to the CJRA, it did not take the form of objections to congressional attitudes toward ADR but was largely predicated on judicial concern for the ability to control their own decisions about case management, free from congressional oversight. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2468 Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. (Mar. 6 & June 26, 1990).

Academics provide examples of essays about the value of adjudication. See Fiss, *supra* note 131; Resnik, *supra* note 70; Resnik, *supra* note 178. Resnik, *supra* note 132; Brunet *supra* note 172. Further, in their analysis of the changes in federal trial processes, Wolf Heydebrand and Carroll Seron warn that technocratic values, of speed and efficiency, are overtaking democratic values embodied in adjudication. HEYDEBRAND & SERON, *supra* note 177, at 222-23. See also discussion of Alschuler, *infra* note 208 and accompanying text. Galanter and Lande argue that contemporary "rights talk" has been "transformed, and in some ways domesticated, in the face of the [ADR] discourses of interest and need." Galanter & Lande, *supra* note 172, at 497.

¹⁸² RICHARD POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 161-62 (Harvard 1985); Richard Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) (discussing Congress' "unwillingness" to shift appellate review of agency decisions to agencies themselves). Judge Posner has raised questions about some forms of ADR; for example, he commented that federal judges lack the authority, without congressional revisions of statutes, to order summary jury trials or court-annexed arbitration. Posner, *supra* note 81, at 385, 391. Further, Posner argued that such programs may not diminish demand on courts nor are they conducted in a manner that permits evaluation of their effects. *Id.* at 392-93.

¹⁸³ Robert Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231 (1976) (address at the Pound Conference). See also DEPT. OF JUSTICE COMM. ON REVISION OF THE FED. JUDICIAL SYSTEM, *THE NEEDS OF THE FEDERAL COURTS* 7-11 (1977) (committee chaired by Robert Bork when he was Solicitor General).

¹⁸⁴ Address by Justice Antonin Scalia to the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987), *reprinted in* 34 FED. B. NEWS & J. 252 (1987).

statutory claims, to agency adjudicators and away from the Article III judiciary.¹⁸⁵ Their advocacy has occurred during decades when Congress, with the Supreme Court's approval, has permitted delegation of adjudication to the non-Article III members of the federal judiciary, to administrative law judges, and to hearing officers in the claims facilities emerging out of large scale tort cases.¹⁸⁶ These lower tier adjudicators are all people with few resources, relatively little prestige, and high case loads. The continuing shift of fact finding in individual small claim cases away from the Article III judiciary works to confirm the place of that aspect of adjudication as a less desirable activity.¹⁸⁷

Fourth, federal adjudication has also undergone substantial changes over the second half of the twentieth century, making difficult argument for any one version of it and blurring its features. In addition to the delegation of adjudication and its fragmentation detailed above, Professor Stephen Yeazell has delineated how the reformation of the Federal Rules of Civil Procedure created an elaborated pretrial process.¹⁸⁸ The expansion of the pretrial process created a space—under the rules filled with pretrial motions and discovery—in which judges have dominion and in which ADR activities can take place. Many judges in that sprawling pretrial process have responded by attempting to give shape to lawsuits and bring them to resolution. Major shifts in both power (more to the district court) and the modes of decision making (alternatives to adjudication) have resulted from that 1930s rulemaking.¹⁸⁹

Sociologists Wolf Heydebrand and Carroll Seron have demonstrated

¹⁸⁵ See Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

¹⁸⁶ Recall that one of the classic distinctions between arbitration and adjudication is that one is a process conducted by someone called an "arbitrator," while adjudication requires a "judge." Until 1990, federal magistrates were called just that—magistrates. They did not receive the title "magistrate judge" until 1990. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117; 28 U.S.C. § 631 (1990). According to the legislative history, the addition of the word "judge" for magistrates was "designed to reflect more accurately the responsibilities and duties of the office." Federal Courts Study Committee Implementation Act of 1990, H.R. REP. NO. 734, 101st Cong., 2d Sess. 31 (1990).

¹⁸⁷ Surveys of life-tenured appellate judges describe them as concerned about their profession. They perceive a deterioration in the amount of reflection and deliberation. They report that techniques, such as unpublished opinions and delegation to staff, are means of responding to caseload problems. Robel, *supra* note 11, at 903.

¹⁸⁸ Yeazell, *supra* note 14. Judge Posner described the promulgation of these rules as the beginning of the federal courts as "an arena of massive experimentation in judicial administration." Posner, *supra* note 81, at 393.

¹⁸⁹ Yeazell, *supra* note 14, at 660-70.

how structural reorganization, growing caseloads, and procedural innovation shifted the environment of the federal courts to one centered on administration, rather than adjudication.¹⁹⁰ Professor Bundy described other changes in federal civil litigation; that cases have become increasingly multi-party and complex, that substantive law has permitted a wealth of claims against litigants who had previously not been exposed to liability, that the bar has grown but lawyer training constricted.¹⁹¹ In an article, *From "Cases" to "Litigation,"* I traced increasing interest in and acceptance of aggregated, large-scale litigation over these past three decades.¹⁹² Professor Lauren Robel has focused on the "privatization" of appellate adjudication, with its increased reliance on unpublished opinions and on staff decisionmaking.¹⁹³

The result of the reformulating of adjudication is that it begins to resemble, incorporate, or subsume ADR. Illustrative is the 1994 proposed report of the Long Range Planning Committee of the Judicial Conference of the United States, which in its chapter "Adjudication," defines that term as "encompass[ing] a number of different functions, from managing the preliminary phases of a case and appeals to concluding proceedings"¹⁹⁴ Thus, changes are coming from within and without, moving the forms of decision making.

Fifth, the intellectual climate of law schools has spawned (if not always welcomed) a series of movements, from the legal realists of the 1930s to the law and economics and critical studies movement of the 1980s, that cast doubt on an image of adjudication as a deeply deliberative, apolitical, rational process. In those social sciences interested in law, studies of law in action have generated an anthropological literature that moved the frame from courts to dispute processing, in general and in diverse locales.¹⁹⁵

These factors provide additional context in which to evaluate the relationship between ADR and adjudication. ADR's ascendancy did not occur in a static world,¹⁹⁶ and its ideological claims converge and overlap with related intellectual frames. During this era, when individual volition is praised and government aid described as a means of oppressing its

¹⁹⁰ HEYDEBRAND & SERON, *supra* note 177, at 1-17, 185-219.

¹⁹¹ Bundy, *supra* note 126, at 26-36.

¹⁹² Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5 (1991).

¹⁹³ Robel, *supra* note 11, at 898-901.

¹⁹⁴ PROPOSED LONG RANGE PLAN, *supra* note 162, at 43.

¹⁹⁵ Galanter & Lande, *supra* note 172, at 460-71.

¹⁹⁶ Nancy Rogers phrased the point well: perhaps adjudication died before ADR rose. Conversation, with Nancy Rogers, Assoc. Dean and Professor of Law at the Ohio State University College of Law, in Columbus, Ohio (March 1994).

recipients, ADR's view of adjudication (as stuck in an outmoded "rights based" adversarial model) becomes easy to hear.¹⁹⁷ The state's function becomes no longer one of either announcing rights, regulating behavior, or policing the interactions of disputants (as it was during the *Wilko* era). Instead, the state seeks agreement. Some theorists of legislative debate and law enactment have come to see it all as dealmaking.¹⁹⁸ Dealmaking becomes a description apt to capture many court-based activities in this era of the alteration of adjudication and of the emergence of ADR.

VI. CONCLUSION: CHANGES TO BE WELCOMED?

Before concluding, I want to be sure that I am not heard as putting forth too pat a story; our legal culture is not unitary or without nuance. We are in a time of transition and counter examples can be provided to the trends I have delineated. Further, my task here is not to elaborate a structural analysis of why procedural forms have been transformed over the last three decades.¹⁹⁹ Rather, I have considered the changes in the ways in which adjudication and ADR have been framed and discussed by members of the legal establishment.

Having provided a procedural history for these past decades, I turn now toward the future. I believe we are approaching a time when many a civil trial will be characterized as a "pathological event."²⁰⁰ One possibility is that this development is to be welcomed as an appropriate correction to

¹⁹⁷ See Galanter & Lande, *supra* note 172, at 472-96 (charting ADR's disinterest in rights and its emphasis on "needs" and "interests"). See also Rand E. Rosenblatt, *The Courts, Health Care Reform, and the Reconstruction of American Social Legislation*, 18 J. HEALTH CARE POL., POL'Y, & L. 439 (1993) (comparing the United States Supreme Court's role as a "rights-enforcer" to one that enhances the discretionary powers of agencies).

¹⁹⁸ See generally William N. Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988) (describing and analyzing some public choice theories of legislation, with the focus on the role of courts as enforcing the original "deal").

¹⁹⁹ Cf. HEYDEBRAND & SERON, *supra* note 177.

²⁰⁰ This phrase comes from the minutes of recent debates within the Advisory Committee on the Federal Rules of Civil Procedure. According to Professor Ed Cooper, that committee's Reporter, the discussion about whether to change Rule 68 to increase sanctions for failure to settle resulted in some members of the committee concluding that it was "a mistake to view trial as a pathological event, resulting from settlement miscalculations of the parties. The system is designed to provide trials." Ed Cooper, Reporter, Minutes of the Advisory Committee of Civil Rules 20 (Oct. 21-23, 1993). See also Yeazell, *supra* note 14, at 667.

what John Langbein calls the "too trial-centered" Anglo-American tradition.²⁰¹ From this perspective, one must recall that a strong source of pressure for ADR comes from the judiciary. Judicial endorsement of ADR is a demonstration from individuals with firsthand knowledge of the weakness of adjudication, its failures and limitations. To the extent judicial support of ADR affects our understanding of the value of adjudication, judges may wisely be participating in a societal shove that will result in the demise of civil adjudication as it is currently understood.²⁰² Further, the decline of civil adjudication—in law courts—and its shift to governmental agencies, claims facilities, and private dispute resolution centers may be the appropriate denouement of this cycle of procedural reform.²⁰³

Alternatively, anxiety about the triumph of ADR can come from across the spectrum, from those perceived to be proponents of ADR as well as from those styled proponents of adjudication. Proponents of ADR have succeeded in making it "an integral part of our federal judicial system."²⁰⁴ In the process, they have helped to change both "our federal judicial system" and ADR.²⁰⁵

For those who envisioned ADR as the blossoming of something different and generative, they should worry (as scholars such as Carrie Menkel-Meadow and Lucy Katz do) about its institutionalization and its transformation into the very adversarial processes that they had hoped to avoid.²⁰⁶ As courts make ADR their own, that formalization may well

²⁰¹ John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1059 (1994). See also Yeazell, *supra* note 14, at 675-76 (reviewing changes in procedure over the past two centuries).

²⁰² See Yeazell, *supra* note 14. For an argument that United States adjudicatory procedures would greatly benefit from reformation, see John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

²⁰³ Here one might return to MacNeil, and his point that the state is the "Johnny come lately" to dispute resolution and the waning of the centrality of its role may well be seen as part of an ongoing reformulation of modes of dispute resolution. See *supra* notes 2-7.

²⁰⁴ Broderick, *supra* note 81, at 225.

²⁰⁵ A recent example of the emerging blur comes from DDI Seamless Cylinder Int'l, Inc. v. General Fire Extinguisher Corp., 14 F.2d 1163, 1164 (7th Cir. 1994), in which, in "[t]his procedurally remarkable case," a magistrate judge sat as an arbitrator, a role the Seventh Circuit concluded would have been impermissibly adopted. The court decided to construe the events as an agreement between the parties and magistrate judge "to an abbreviated judicial procedure rather than an unauthorized arbitral one." *Id.* at 1168.

²⁰⁶ Menkel-Meadow, *supra* note 119, at 5, 13-16 (ADR was meant to "challenge" the adversarial system, but instead ADR has been taken over and changed by the system. Capture, "colonization," and co-optation have transformed ADR into "just another stop in the 'litigotiation' game"); Katz, *supra* note 92, 1, 5 ("voluntary nature of alternatives has been

undermine the very attributes of ADR that prompted its praise. Further, as courts compel ADR, the relationship between ADR and volition weakens, pushing it ever closer to a state-imposed mode of resolution. On the other hand, when ADR mimes adjudication, the critique of ADR as a lawless or factless process loses strength.²⁰⁷

Similarly, those who think adjudication has something to offer had better start explaining why one would aspire to a preserve for adjudication, and why relatively highly paid government officials (to wit federal and state judges) should be empowered to do some of it. If there is an important and affirmative—if not a cheerful—story to be told for the preservation of adjudicatory forms, with judges in distinctive roles, and why a culture would value, cherish, fund, encourage, and sometimes insist on adjudication, then those who believe so had better speak up soon, for it is becoming increasingly hard to hear those claims.

A vivid example of this problem is provided by turning to the work of one prominent adjudication advocate, Professor Albert Alschuler. In his essay, "Mediation with a Mugger,"²⁰⁸ he examined the justifications for public subsidies for civil adjudication, concluded that the task of "[i]mpartial adjudication" was a central one for government to undertake,²⁰⁹ and worried about the "shortage of adjudicative services."²¹⁰ He urged that adjudication be remodeled, to respond to problems of procedural complexity

eroded," and it is problematic for ADR to take on formalistic characteristics of adjudication). See also Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 J. DISP. RESOL. 231, 233 (1990) (criticizing Supreme Court enforcement of agreements to arbitrate as undermining the volition critical to arbitration's integrity, and lauding arbitration for its capacity to provide "adjudicatory self-determination"); Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW., Feb. 1994, at 53-54 (growing concern about the bills of court-appointed, court-annexed ADR providers); Susan S. Silbey, *Mediation Mythology*, 9 NEGOTIATION J. 349, 353 (1993) (critiquing proposed "guidelines for selecting mediators" as both wrongly portraying the role and also restricting access to the profession).

Cf. Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992) (calling for constitutional rights in private contractual arbitration to ensure due process fairness).

²⁰⁷ See, e.g., Craig A. McEwen, Lynn Mather & Richard J. Maiman, *Lawyers in and Everyday Life: Mediation in Divorce Practice*, 28 J. L. & Soc'y 149, 183 (1994) (Mediation of divorce in Maine as is used in "heavily litigated" cases, relies on "legal rules," serves as a "relatively formal adjunct to negotiation," and "strengthens . . . the ability of lawyers to influence decisions.").

²⁰⁸ Albert Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

²⁰⁹ *Id.* at 1816.

²¹⁰ *Id.* at 1818-24.

and the capacity of litigants to inflict wasteful costs on each other.²¹¹ His preferred solutions all seek "a simplified form of adjudication"—that would include the possibility of impartial factfinding.²¹² His preference is for "first instance" and "second instance" trials, scaled back in an effort to distribute adjudicatory services.²¹³ When one reads the details of Alschuler's proposal, it sounds quite like court-annexed arbitration,²¹⁴ albeit sometimes with public access.²¹⁵

But court-annexed arbitration, which could be described as scaled down adjudication, may also become vulnerable to the criticisms that animate its installation. Many of the rhetorical claims made on behalf of ADR may prompt policy makers to create settlement mechanisms rather than procedures that closely resemble adjudication. The emphasis placed on the quality of information possessed by the parties and on the cost and inefficiencies of transferring that information to a third party decision maker puts pressure on court-annexed arbitration, which could well be called "short trials." Moreover, empirical research has raised questions about whether court-annexed arbitration saves time or money. Robert MacCoun's study of court-annexed arbitration in New Jersey found that neither public costs were saved nor time to disposition shortened in the arbitration

²¹¹ Alschuler, *supra* note 208, at 1824-25, 1830-31.

²¹² *Id.* at 1837.

²¹³ *Id.* at 1845-54.

²¹⁴ Some courts have adopted "tracking" programs that provide less process for particular kinds of cases, thereby approximating some of what Alschuler seeks. *See, e.g.*, the Delaware Senate Joint Resolution, 1993 DEL. S.J.R. 28 (Jan. 27, 1994) (in commercial cases in which more than a million dollars is in dispute, parties may consent to summary procedures with limited discovery and a shortened trial before a judge). Further, as discussed above, in the revision of the *Wilko* doctrine, private arbitration and adjudication also become assimilated, compared to each other and perceived to share similar characteristics and goals. *See supra* notes 52-67 and accompanying text.

²¹⁵ According to Bernstein, federal court-based ADR programs "cannot offer parties the same degree of secrecy as private ADR programs." Bernstein, *supra* note 125, at 2240. However, the survey of voluntary programs done for this essay makes less clear the relationship between court-based ADR and privacy; those programs did not uniformly report that public access was available. Two of the eight districts stated the public could attend arbitrations; three stated that it was up to the parties; and three had no knowledge or provided no guidance on public access. Moreover, none reported retaining the transcripts of arbitration proceedings. *See supra* note 33 and accompanying text (detailing survey done). *See also In re A.H. Robins Co. (Anderson)*, 42 F.3d 870 (4th Cir. 1994) (holding that arbitration rules created by a claims facility within bankruptcy and promulgated by the Dalkon Shield Trust were entitled to deference, reviewed under an abuse of discretion standard).

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program.²¹⁶ While court-annexed arbitration may be cheaper and quicker than trial, few cases in fact go to trial, and court-annexed arbitration is slower and more expensive than settlement. In short, the barrage of anti-adjudication claims in the promotion of state-run and state-mandated ADR may hit court-annexed arbitration as well. The interaction may well cause the ADR spectrum to narrow as well, because the ideological claims increasingly point toward settlement as *the* desired mode of dispute resolution.²¹⁷

As this century draws to its end, we can observe the melding of ADR into adjudication, and then the narrowing of ADR and its refocusing as a tool to produce contractual agreements among disputants. The focus is shifting from adjudication to resolution. Frank Sander's lovely image of the accessible, multi-doored courthouse—with one door wide open for adjudication—has now been eclipsed. The door to the twentieth century's version of adjudication is closing.

²¹⁶ MacCoun, *supra* note 125, at 230. See also Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 98-99 (court-annexed arbitration may be preferred for providing more process to litigants than does settlement).

²¹⁷ "Bargaining in the shadow of the law" continues to be an apt metaphor. As the "law" moves to embrace alternative dispute resolution, its shadow moves as well.

